Petition

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No._____

In the
Supreme Court of the United States
OCTOBER TERM, 1981

WEYERHAEUSER COMPANY and WILLAMETTE INDUSTRIES, INC.

Petitioners,

vs.

LYMAN LAMB COMPANY, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Dated: March 2, 1982

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QUESTIONS PRESENTED

The decision by the Fifth Circuit in this important multidistrict litigation (generally referred to as the "Plywood Cases") raises issues central to the law of antitrust conspiracy and damages, and directly conflicts with the result in parallel proceedings before the Ninth Circuit and with the legal standards applied by other circuits.

The Fifth Circuit, in a ruling that respondents' counsel estimate could result in a classwide judgment for as much as two billion dollars (Wall St. J., Sept. 9, 1981, at 48, Col. 4), held that the plywood industry's historic method of quoting delivered prices, based on an individually negotiated mill price plus a standardized freight factor, constituted illegal price fixing. In a related action brought by the Federal Trade Commission, the Ninth Circuit held that this same method of price quotation was non-collusive, promoted competition by facilitating customer price comparison, and had no adverse effect on delivered prices.

These divergent results stem from the conflicting resolution of two fundamental legal questions:

1. Can a conspiracy properly be inferred from parallel business conduct, plus some inter-company contacts, when the conduct is consistent with what would be expected in a competitive market?

2. Can the measure of damages in cases involving the alleged fixing of only one element of price be based solely on that single element, or must it reflect the challenged conduct's effect on the total price paid by the buyer?

An additional question raised by the decision of the Fifth Circuit is whether petitioners were denied due process when (a) in a bifurcated trial, the trial court submitted the measure of damages to the liability jury despite the parties' reasonable understanding that it had been severed for later trial, and (b) the trial court's special interrogatories to the jury limited consideration to only one measure of damages.

Petitioners also join in the questions presented in the separate petition being filed by Georgia-Pacific Corporation.

PARTIES TO THE PROCEEDINGS

Petitioners and Georgia-Pacific Corporation were appellants below.

In addition to Lyman Lamb Company, appellees below were Plywood Distributing Company, Baton Rouge Lumber Company, and the City of Arkadelphia, Arkansas. The remaining plaintiffs in the cases consolidated for trial in Multidistrict Litigation No. 159 and the remaining members of the plaintiff class, consisting of all persons who purchased softwood plywood directly from the manufacturers during the period from February 23, 1968 through December 31, 1973, also had an interest in the outcome of the appeal.

Weyerhaeuser's subsidiaries and affiliates are: Camac Veneer, Inc.; Mountain Tree Farm Co.; North Pacific Paper Corp.; Shemin Nurseries, Inc.; Weyerhaeuser International, Inc.; de Bes' Insurance, Ltd.; Forest Insurance, Ltd.; Kennedy Bay Timber Sendirian Berhad; Silam Forest Products Sendirian Berhad; Pacific Hardwoods Sendirian Berhad; Weyerhaeuser Europe, S.A.; and Cornerstone Development Co.

Willamette's subsidiaries and affiliates are: Freres Veneer Co.; Santiam Southern Co.; Western Kraft East, Inc.; Wimer Logging Co.; and Taylor Development Co.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Weyerhaeuser Company and Willamette Industries, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered on September 8, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 655 F.2d 627 and appears as App. A in the Joint Appendix. The unreported opinion of the District Court denying a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial appears as App. C.[1] Due to the significance to this petition of the Ninth Circuit's ruling in *Boise Cascade Corp.* v. *FTC*, 637 F.2d 573 (9th Cir. 1980), that opinion is included as App. J.

[1] The District Court opinion certifying the case as a class action is reported at 76 F.R.D. 570 and appears as App. D. The opinion of the Judicial Panel on Multidistrict Litigation consolidating the actions under 28 U.S.C. § 1407 is reported at 376 F. Supp. 1405 and appears as App. E.

JURISDICTION

The judgment of the Court of Appeals (App. F) was entered on September 8, 1981. Timely petitions for rehearing and rehearing *en banc* were denied on November 3, 1981 (App. G). On January 18, 1982, Justice White extended the time for filing this petition to March 3, 1982 (App. H). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

STATEMENT OF THE CASE

The private actions that are the subject of this petition and the parallel FTC proceedings both put in issue the plywood industry's long-standing method of quoting delivered prices. Neither the FTC, the jury nor the Fifth Circuit concluded there was any fixing of the *delivered prices themselves.* The attack below was limited to the *form in which the prices were quoted,* a form that had been used openly for at least half a century.

Industry Background. The plywood industry's method of quoting prices developed when all plywood was produced in the Pacific Northwest and had two facets:

> *First,* producers quoted a delivered price consisting of an individually negotiated mill price plus rail freight from the West Coast. Since the ICC tariffs were

uniform for all West Coast producers, this method of quotation facilitated price comparison among buyers.[2]

Second, producers quoted freight on the basis of standardized rather than actual weights. Because most plywood is sold before its actual weight is known, the use of standardized weights allowed producers to offer buyers a firm delivered price at the time of quotation.[3]

In 1964, Georgia-Pacific Corporation, one of the appellants below, opened the first southern plywood mill, following a technological breakthrough that made it possible to produce plywood from southern pine. Other producers, including petitioners Weyerhaeuser and Willamette, soon followed. By the time of trial, there were 16 producers operating only in the South, 100 operating only in the West, and 8 (including petitioners) operating in both.

In the early years of the southern plywood industry, western producers remained the principal suppliers, even in the South. To attract customers who were initially skeptical of the quality of southern plywood, southern producers generally quoted below the western price. For ease of comparison by buyers, southern producers continued the existing pricing format: individually negotiated mill prices plus West Coast freight computed on standardized weights. As the Ninth Circuit found and the record below confirmed:

"The use of West Coast freight enabled buyers to compare western and southern plywood prices by reference to a single mill or index price, knowing that the

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[2] For example, a St. Louis buyer with a quote of $85 per 1,000 square feet plus West Coast freight could readily compare it with another quote of $87 plus West Coast freight. If he had multiple locations, he could also readily compare it with a quote to a Cleveland location of $86 plus West Coast freight, although the freight charges to St. Louis and Cleveland were different. In short, the mill price became the common denominator, or "index price," for nationwide competition.

[3] The standardized weights were promulgated under the National Industrial Recovery Act during the 1930's and were repromulgated by the Office of War Information in 1943, and again by the Office of Price Stabilization in 1952. *Boise Cascade Corp.*, 91 F.T.C. 1, 30-31 & n.43 (1978).

> precise difference would be reflected in a total delivered price. Without West Coast freight, comparison would also have been more cumbersome because southern freight rates are point-to-point rather than zone rates and vary according to the weight of the load." (637 F.2d at 574 n.1 (App. J-2))[4]

Although the pricing format of the southern and western mills was the same, the delivered prices themselves were not. Not only were southern prices generally lower than western prices, but both southern and western prices differed from seller to seller and from transaction to transaction, fluctuating widely in response to changing market conditions.[5]

The FTC Proceeding and the Ninth Circuit Decision. The FTC case charged that petitioners and three other plywood manufacturers had individually, and in combination with other southern mills, adopted the parallel use of West Coast freight in violation of § 5 of the FTC Act. The FTC also charged an industry-wide combination to use estimated weights. The FTC case resulted in an Initial Decision by the Administrative Law Judge in 1976 and a final Commission Opinion and Order in 1978. *Boise Cascade Corp.*, 91 F.T.C. 1 (1978).

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[4] Continuing the earlier illustration, the St. Louis buyer could readily compare a quote from a western producer of $85 per 1,000 square feet plus West Coast freight with one from a southern producer at $80 plus West Coast freight. If West Coast freight to St. Louis is $15, the delivered prices of the western and southern producers would be $100 and $95, respectively, which directly reflects the $5 difference in the mill or index prices of $85 and $80. This method of quoting prices (including the use of standardized weights) is hereafter referred to as "quoting West Coast freight." *See,* Vol. 45, Tr. 299-300; Vol. 48, Tr. 1035-36, 1075; Vol. 49, Tr. 1374-76. The following abbreviations are used for the record below: "Vol." (volumes of the Record on Appeal); "2d Supp. Vol." (volumes of the Second Supplemental Record on Appeal); "Tr." (trial transcript); and "PX" (plaintiffs' exhibit).

[5] *See generally* 637 F.2d at 577 (App. J-9); Vol. 48, Tr. 894-95, 1048-50, 1063-64; Vol. 49, Tr. 1347-48; Vol. 54, Tr. 2753; Vol. 54, Tr. 2803, 2814-15.

The ALJ found no basis for concluding that the southern producers' use of West Coast freight was the result of "overt collusion," despite the "opportunities" to conspire arising from the producers' inter-company sales, their trade association memberships and the "direct evidence of the exchange of information" among them. (*Id.* at 51, 100) Taking an expansive approach to this Court's Sherman Act precedents, however, the ALJ concluded that a conspiracy could be "inferred from [the southern producers'] pursuit of a common course of conduct involving the inclusion of a uniform freight charge based on West Coast freight for plywood shipments from southern mills." (*Id.* at 100; *see also* 76-78)

The full Commission adopted the ALJ's finding that there was no overt collusion, observing that petitioners and the other southern producers were "obviously not" in "a price-fixing cartel." (*Id.* at 99 n.10, 102, 105) The Commission declined to hold, however, that a Sherman Act conspiracy could be inferred from the continuation of a parallel pricing practice that the Commission acknowledged was "innocent" in its origin. To draw such an inference, the Commission concluded, "would constitute something of an extension of the common understanding" of the term "conspiracy." (*Id.* at 102 & n.15) Nevertheless, the Commission held that the southern producers could be ordered to cease and desist from quoting West Coast freight on the ground that "the concurrent although non-collusive adoption by competitors of an artificial method of pricing which restrains competition" was unlawful under § 5. (*Id.* at 103)

In May 1980, the Ninth Circuit set aside the Commission's order. *Boise Cascade Corp.* v. *FTC*, 637 F.2d 573 (9th Cir. 1980) (App. J). The Court (per Wallace, J.) held that, whether approached under § 5 of the FTC Act or § 1 of the Sherman Act, "parallel behavior, without more, does not trigger the *per se* treatment which is given to overt agreement." (*Id.* at 581, App. J-17) Rather, "the weight of the case law" makes clear that "we are looking for at least tacit agreement to use a formula which has the effect of fixing

prices." (*Id.* at 576, App. J-7 to -8) As Judge Wallace explained:

> "The debate over conscious parallelism comes down to whether it is ever appropriate for evidence of the anticompetitive effect of certain types of parallel conduct to serve as a substitute for the Sherman Act requirement of agreement. Without reaching that broader issue, we believe that to apply *per se* analysis to these facts would be to assume what must be proven, namely, that the use of West Coast freight by southern plywood producers is not a natural competitive response to buyers' preference for traditional forms of price quotation, but rather is a deliberate restraint on competition. Without proof that the practice exerts an anticompetitive effect on the price of plywood, we have no reason to make such an assumption. *Cf. Turner, Agreement under the Sherman Act, supra*, 75 Harv. L. Rev. at 658-59 (conscious parallelism is evidence of agreement only if additional facts indicate that the decisions are inexplicable as ordinary competitive decisions)." (*Id.* at 581, App. J-17)

Based on a careful analysis of competitive conditions in the plywood industry, the Ninth Circuit found "a complete absence of meaningful evidence in the record that price levels in the southern plywood industry reflect an anticompetitive effect" from the use of West Coast freight. (*Id.* at 579, App. J-12) It also found "a complete absence of evidence implying overt conspiracy" to quote on that basis. (*Id.* at 582, App. J-18)

Judge Wallace observed that the challenged method of quoting plywood prices was "a natural and competitive development in the emergence of the southern plywood industry," since the "use of West Coast freight made possible ready comparison between western and southern plywood prices" and "encouraged expansion of southern mills." (*Id.* at 574, 582, App. J-2 to -3, J-18) Even after the southern producers had established themselves, they "continue[d] to compete with western plywood in many areas of the country," and buyers in those areas were "particularly likely to

prefer the ready price comparison between western and southern plywood made possible by the use of the West Coast index price." (*Id.* at 578, App. J-11)

The Ninth Circuit found a "complete lack of buyer testimony objecting to the practice," with purchasers instead expressing the "belief that the system had no effect on prices." (*Id.* at 580, App. J-14) The latter testimony was confirmed by evidence that mill or index prices were the subject of substantial bargaining and varied "in response to market factors affecting supply and demand." (*Id.* at 577, App. J-9) Because of this price competition, Judge Wallace concluded there could be no adverse effect on the ultimate price, since there was nothing to counter "the common-sense proposition that southern plywood producers would simply adjust the index price upwards if they were quoting delivered prices in terms of actual freight," rather than West Coast freight. (*Id.* at 580, App. J-14)

In sum, the Ninth Circuit concluded that the southern producers' use of West Coast freight involved the *form* in which delivered prices were expressed without affecting the *delivered prices themselves.*

The Jury Trial and the Fifth Circuit Decision. The private actions, filed under 15 U.S.C. § 15, challenged the same method of quoting plywood prices as the FTC proceeding. Trial commenced in October 1978, while the Ninth Circuit appeal was pending.[6] Although there were some differences from the FTC record, the key evidence was the same. Respondents opened their case, over defendants' objection, with a 31-page reading to the jury from selected FTC findings. They again stressed the parallel to the FTC case in closing argument, suggesting that the FTC had found against defendants on the issue of conspiracy. (Vol. 45, Tr. 152-83; Vol. 46, Tr. 3244) Defendants were not allowed to inform the jury of the FTC's favorable rulings on the con-

[6] All the private actions had been consolidated in the Eastern District of Louisiana in 1974, and the plaintiff classes were certified in 1976. (App. E, App. D)

spiracy issue and, of course, the Ninth Circuit's decision had not yet been rendered.

Respondents' other evidence on the conspiracy issue relied heavily on the same type of documentary evidence of intercompany contacts that had been presented in the FTC proceeding. Respondents' only live witness was an economist who testified that the southern producers' method of quoting prices was fully consistent with competition in the South at its inception, but that it should have gradually disappeared. (Vol. 53, Tr. 2467) He was unable to say when this should have occurred or the extent to which the West Coast freight factor had been offset by lower mill prices. (Vol. 53, Tr. 2470-71)

Respondents' remaining witnesses appeared by deposition. As in the FTC proceeding, no plywood buyer (including respondents) testified that defendants' method of quoting prices had had any adverse effect on delivered prices. Several stated that they preferred to receive quotes in this form for ease of comparison. (Vol. 45, Tr. 299-300; Vol. 51, Tr. 2005; Vol. 54, Tr. 2747)

In November 1978, the jury returned a verdict that petitioners and Georgia-Pacific had engaged in a conspiracy to use West Coast freight with the other southern plywood manufacturers from February 23, 1968 to December 31, 1973.[7] Although the trial court had earlier bifurcated the issue of the amount of plaintiffs' damages, and later acknowledged that defendants had understood this to mean that the issue of measure of damages had been severed, the court on its own initiative submitted interrogatories to the jury on the appropriate damage measure. The jury adopted the only measure suggested in the interrogatories: the difference between West

[7] The jury also found a *nationwide* conspiracy to use standardized weights on sales of *western* (but not southern) plywood. (Special Verdict, App. I)

Coast freight and actual freight. (App. I)[8] Respondents have estimated that this could lead to two billion dollars in classwide damages.[9]

On September 8, 1981, the Fifth Circuit affirmed the jury's verdict in all respects. On the "conspiracy" issue, the Court (per Ingraham, J.) held that "the parallel pricing conduct clearly demonstrated in the record plus the numerous items of direct evidence of communication between high-level personnel on pricing policy adequately support the jury's verdict." (655 F.2d at 634, App. A-9) Although this was the same type of evidence that the ALJ, the FTC and the Ninth Circuit had found insufficient to establish collusion, the Fifth Circuit made no effort to reconcile the discrepancy on the merits.[10] Instead, Judge Ingraham dismissed the Ninth Circuit result in a footnote on the ground that the Fifth Circuit was not "bound" by the earlier decision. (*Id.* at 636-37 n.2, App. A-13)[11]

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[8] Thereafter, the trial court granted summary judgment to respondents, four sample plaintiffs, fixing the amount of their individual damages. (App. B) The calculation of individual damages for other class members is the subject of current proceedings in the trial court.

[9] While petitioners believe that this estimate is an inflated one, there is no question that the sums at stake are substantial.

[10] For example, the ALJ found no overt conspiracy although he specifically quoted or relied on several of the same memoranda cited by the Fifth Circuit as "direct evidence of communication between high-level personnel on pricing policy." (*Compare* 91 F.T.C. at 51-52 *with* 655 F.2d at 633-34, App. A-6 to -8)

[11] The Fifth Circuit erred in believing that the separate statutory bases for the two proceedings made any difference. The Ninth Circuit ruled that the same showing was required to establish collusion under §5 and §1. (Pages 5-6, *supra*) In fact, had the Ninth Circuit ruled that less was required under §5, its finding that there was no collusion would apply *a fortiori* to a case, such as this, under the stricter standards of §1.

On the "damage" issues, the Fifth Circuit approved the measure of damages fixed by the jury, stating that, "given proof of the fact of damage, proof of losses which border on the speculative is allowed in order to facilitate the policy of the antitrust laws." (*Id.* at 635, App. A-10; citation omitted) As with the conspiracy issue, Judge Ingraham made no attempt to reconcile the potentially staggering damages resulting from this measure with the Ninth Circuit's conclusion that defendants' use of West Coast freight had no effect "on overall price levels." (637 F.2d at 581, App. J-16)

REASONS FOR GRANTING THE WRIT

When two courts of appeals render diametrically opposed decisions regarding the legality and effect of the same pricing practices of the same defendants over the same time span, one of those decisions is wrong. Such an "unusually direct conflict between two circuits" presents the paradigm for granting certiorari under this Court's Rule 17(1)(a).[12] Certiorari is particularly appropriate because the conflict dramatizes two legal issues fundamental to the proper enforcement and application of the Sherman Act: *first*, whether an industry-wide conspiracy can be inferred from parallel conduct that is consistent with what would be expected in a competitive market; and, *second*, whether damages in a single element price fixing case can be computed based on only that element, without taking account of the effect, if any, on the total price paid by purchasers for the product.

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[12] *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 191 (1974) (conflict concerning the legality of the same employment practices of the same employer). *See also CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) (conflict concerning release under FOIA of a single set of documents). The large dollar amount at stake also underscores the need to resolve the conflict. *Commissioner* v. *Standard Life & Accident Ins. Co.*, 433 U.S. 148, 151 & n.5 (1977) (conflict involved "substantially more than $100 million").

The inconsistent resolution of these questions by the Fifth and Ninth Circuits has important ramifications for the nation's competitive economy. Faced with conspiracy and damage standards so amorphous that the same practices can be simultaneously condoned and condemned by different courts, businessmen have no way of rationally planning their conduct. This uncertainty can seriously deter the competition the antitrust laws seek to encourage. As the Court emphasized in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 441 (1978), "salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment."

While *Gypsum* stressed the need for clear standards in criminal conspiracy cases, the Court's observations are equally pertinent in the civil antitrust context. *See Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 637 (1981) (discussing "the possibility that severe antitrust penalties will chill wholly legitimate business agreements"). Over the years, the penal nature of the treble damage remedy has been heightened by the rules relating to contribution, the increasing use of the class action device, and statutory authority for States to sue on behalf of their citizens. The combined effect is that a single defendant is faced with the realistic prospect of being held liable for threefold the damages suffered by every customer of any and all industry participants. Confronted with such potentially disabling liability, no defendant can risk going to trial, however much convinced of its innocence, unless its conduct will be assessed according to economically and competitively sound standards that lead to predictable—and correct—results.

Point I—Conspiracy cannot be inferred from parallel business practices plus some inter-firm contacts when the practices make sense as individual competitive decisions.

The Fifth Circuit decision stands for the proposition that parallel pricing practices, coupled with inter-company communications reflecting an opportunity for conspiracy, can support a finding of illicit agreement. (655 F.2d at 634, App. A-9) The Ninth Circuit decision, like recent decisions from the Third and Seventh Circuits, stands for the proposition that parallel pricing practices, even accompanied by such communications, cannot support an inference of conspiracy unless the practices themselves "are inexplicable as ordinary competitive decisions." (637 F.2d at 581, App. J-17)

This Court has not directly addressed the issue of what is required beyond "conscious parallelism" to infer a conspiracy since its decision over a quarter century ago in *Theatre Enterprises* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954). That decision and its predecessors, while not stating an explicit legal rule, are grounded on the principle that consciously parallel conduct, although accompanied by some inter-firm contacts, can rise to the level of conspiracy only where the challenged conduct would be against the self interest of individual firms, unless engaged in collectively. Otherwise, as a matter of law, individual competitive decision-making is as likely and logical an inference as concerted conduct.

Thus, in both *Interstate Circuit* v. *United States*, 306 U.S. 208 (1939), and *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946), agreements were inferred from parallel conduct where the conduct would have been detrimental to any individual firm if not undertaken by all involved. In *Theatre Enterprises*, on the other hand, an agreement was not inferred from parallel conduct where the conduct was entirely rational on an individual firm basis.

Courts and commentators generally recognize the legal principle underlying these decisions.[13] Nevertheless, the absence of an explicit statement of law has led to some confusion in the lower courts, typified by the standard endorsed by the Fifth Circuit in this case. The time is ripe for this Court to dispel this confusion by making explicit the analytical basis for its earlier decisions.

The need for guidance from this Court is illustrated by a comparison of the Fifth Circuit's decision with two recent decisions by other circuits. In *Tose* v. *First Pennsylvania Bank*, 648 F.2d 879 (3d Cir.), *cert. denied*, 102 S. Ct. 390 (1981), the Third Circuit held that, when a plaintiff claims that "concerted action may be inferred from evidence of parallel business behavior," it must make " 'a showing of acts by defendants in contradiction of their own economic interests.' " *Id.* at 894, *quoting Venzie Corp.* v. *United States Mineral Products Co.*, 521 F.2d 1309, 1314 (3d Cir. 1975).

Similarly, in *Weit* v. *Continental Illinois National Bank & Trust Co.*, 641 F.2d 457 (1981), *cert. denied*, No. 81-152 (March 1, 1982), the Seventh Circuit held that an inference of conspiracy was impermissible where parallel interest rates were fully consistent with the "logical inference" that they were based on the individual "business reasons" of each defendant. *Id.* at 462.[14] Notably, *Weit* and *Tose* specifically rejected the proposition that a contrary result was justified

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[13] See cases cited in note 14 and Sullivan, *Handbook on the Law of Antitrust* 315 (1977); Turner, *The Definition of Agreement and Refusals To Deal Under the Sherman Act*, 75 Harv. L. Rev. 655, 658 (1962).

[14] Other lower court decisions applying this rule include: *North Penn Oil & Tire Co.* v. *Phillips Petroleum Co.*, 358 F.Supp. 908, 923 (E.D. Pa. 1973); *Independent Iron Works* v. *United States Steel Corp.*, 322 F.2d 656, 661 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963); *Harlem River Consumers Co-Op.* v. *Associated Grocers*, 408 F.Supp. 1251, 1278 (S.D.N.Y. 1976); *Milgram* v. *Loew's Inc.*, 192 F.2d 579, 583 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952); *Chorak* v. *RKO Radio Pictures*, 196 F.2d 225, 229 (9th Cir.), *cert. denied*, 344 U.S. 887 (1952).

by evidence of inter-company contacts affording an "opportunity to conspire." (See page 15, *infra*)

The rule suggested by the Third, Seventh and Ninth Circuits rests on sound economic, as well as legal, principle. As an initial matter, it is clear that parallel conduct alone provides no answer to whether collusion exists. Indeed, under conditions of perfect competition, all firms would charge the same price, and all firms would quote price in the form most familiar to their customers. What distinguishes collusive from innocent parallel behavior is the presence or absence of a need for collective action. A price fixing conspiracy cannot succeed unless all or most sellers participate. This is because an individual firm that raises prices, while its competitors maintain theirs, would simply lose sales without having any appreciable effect on price. A corollary is that each member of a conspiracy has an incentive to "cheat" by maintaining its production (and thus sales) level while its competitors seek to push prices up by restricting output. Given these economic axioms, a price fixing conspiracy can rationally be inferred only where sellers engage in conduct that would be against each firm's self interest if undertaken independently, and would be in each firm's self interest only if undertaken collectively. Parallel adoption of a quotation format generally favored by buyers clearly does not meet this test.

The Fifth Circuit took no account of these crucial considerations. It made no attempt to evaluate whether the conduct of each petitioner was consistent with its independent self interest. Nor did the Court even mention, let alone deal with, the historical and competitive justification for petitioners' pricing format so carefully traced by the Ninth Circuit. Instead, it applied a rule that placed its sole emphasis on parallel conduct plus "direct evidence of communication between high-level personnel on pricing policy." This standard is demonstrably defective.

First, it does not discriminate between inter-company communications concerning the challenged method of quoting

prices and communications on other pricing matters. The point is illustrated by the six assertedly "damaging" memoranda cited in the Fifth Circuit opinion to support the conspiracy finding. (655 F.2d at 633-34, App. A-6 to -8) None even refers to the practice of using standard weights, and the only one mentioning West Coast freight is an internal memorandum of Weyerhaeuser reporting on prices Georgia-Pacific *had already adopted* in the marketplace.[15] Such competitive intelligence gathering has been repeatedly held proper. *E.g., National Auto Brokers Corp.* v. *General Motors Corp.*, 1976-2 Trade Cas. ¶61,211 (S.D.N.Y. 1976), *aff'd*, 572 F.2d 953 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

Second, the Fifth Circuit's standard does not distinguish between communications, like the six memoranda, that reflect at most an "opportunity to conspire" among a few members of the industry, and communications that legitimately warrant the conclusion that they ripened into an illicit agreement. *Compare Tose* v. *First Pennsylvania Bank*, 648 F.2d 879, 894 (3d Cir.), *cert. denied*, 102 S. Ct. 390 (1981) (summary judgment for defendants affirmed since "[h]uman experience does not support the inference of actual conspiracy from proof of the basic fact of opportunity to conspire"); *Weit* v. *Continental Illinois National Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), *cert. denied*, No. 81-152 (March 1, 1982) (summary judgment for defendants affirmed because "opportunity to conspire, even in the context of parallel business conduct," is not probative unless conspiracy is "the compelling, if not exclusive, rational inference").

Third, the Fifth Circuit's standard gives no consideration to whether the inter-company contacts encompassed all or even a significant percentage of the alleged conspirators. Here, as an example, quite apart from the innocent nature of

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[15] The memorandum recited that Georgia-Pacific personnel "have adopted the following price basis. Low Crow's [a trade reporting service] less 5% less 3% plus West Coast freight. This applys [sic] in truck lots (Mill) &/or pick up at the local Columbia warehouse." (655 F.2d at 633, App. A-7)

the communications, only a small fraction of the producers were even arguably shown by the documents to have communicated with each other. Yet the jury was permitted to find that the conspiracy—and, in turn, defendants' liability —encompassed all southern plywood producers (as to West Coast freight) and all southern and western plywood manufacturers (as to standardized weights). The trial court conceded that this posed "a difficult problem," but upheld the verdict based on evidence that "the challenged practices were industry-wide in scope and were employed by all manufacturers." (App. C-3) This ruling, affirmed by the Fifth Circuit without discussion, means that the vast majority of producers were swept into the "conspiracy" based *solely* on evidence of parallel pricing behavior.

This Court should not only reaffirm that "'conscious parallelism' has not yet read conspiracy out of the Sherman Act" (*Theater Enterprises*, 346 U.S. at 541), but should explicitly adopt the standard suggested by the Third, Seventh and Ninth Circuits: parallel conduct plus inter-firm communications do not warrant a conspiracy finding where the practices are in the independent self interest of each defendant. Authoritative resolution of this issue would give needed guidance to the business community and the lower courts and would greatly reduce the current uncertainty in the law of inferred conspiracy. It would free firms to follow their individual commercial interests—and, more important, the consumers' interest in efficient business practices—by independently adopting whatever practices will enable them to compete most effectively in the marketplace without concern that their unilateral conduct could be branded a "conspiracy." And, it would lead to a reversal of the judgment below.

The Ninth Circuit's discussion of the history and development of the southern producers' method of quoting prices demonstrates that it was plainly in the individual self interest of petitioners and other producers to quote on the basis of West Coast freight when they began operating in the South. At that time, the major competition came from the West

Coast. Regardless what other southern producers did, a particular southern producer would find it advantageous to express its price in the form which was most familiar to potential customers and which enabled the customers easily to see that this delivered price was lower than those of western competitors.

This was also true after the southern plywood industry became better established. Any southern producer who abandoned the prevailing practice by shifting to a higher "mill" price and a lower "freight" charge might risk losing the business of confused customers. Such customers were not only most familiar with the "West Coast freight" format, but also preferred it for ease of price comparison, especially in those areas where western and southern plywood continued to compete. This explains why no customer—not even respondents—testified that the method of quoting prices adversely affected the prices themselves, and many endorsed it as procompetitive. (637 F.2d at 580, App. J-14)

Petitioners submit that this Court should grant certiorari in this precedent-setting litigation, where the issues are of obvious moment and have been sharpened by the conflicting decisions in the circuits, to provide the lower courts and the business community with guidance on the type of circumstances necessary before conspiracy can be inferred from parallel business practices and inter-firm contacts. This does not necessitate a reexamination of the factual record. Rather, it calls for a sharper definition by this Court of the legal standards to be followed in determining whether otherwise legitimate conduct can be the basis for imposing draconian damage liability.

"Conspiracy" is not a self-defining concept. If the courts do not give it meaningful content, based on rational standards of proof, they invite long and complicated cases producing unfair and irrational results, or very short exercises in legal extortion.

Point II—Damages in "one element" price fixing cases must reflect the challenged conduct's effect on the total price.

Purchasers were buying plywood, not freight. Consequently, the only relevant issue was whether purchasers paid more for their *plywood* because of the challenged practice of quoting on the basis of West Coast freight. The Fifth Circuit never examined this issue. Instead, it limited itself to the amount by which the *freight component* of delivered prices may have been affected. It did not pause to ask whether or to what extent any asserted increases in freight were offset in the ultimate price of the plywood by reductions in mill prices.

The Fifth Circuit's damage methodology highlights an issue of broad reach—the appropriate measure of damages in cases where only one element of the total price is allegedly fixed, whether it be freight, credit terms, packaging charges, royalties or the like. The Fifth Circuit's measure looks solely at the assertedly fixed element—here, freight—and gives no consideration to whether any or all of that difference was offset by adjustments in other pricing elements.

The Ninth Circuit, in contrast, recognized the crucial importance of examining the impact on the ultimate delivered prices. In this connection, it found "a complete absence of meaningful evidence in the record that price levels in the southern plywood industry reflect an anticompetitive effect" because of the method of quoting freight. (637 F.2d at 579, App. J-12) Since there was admitted price competition in mill prices, the court correctly reasoned that this would be translated into competitive delivered prices, regardless of how freight was quoted.[16] As noted earlier, Judge Wallace

[16] Even the FTC recognized that the competition in mill prices meant that some of the freight and weight differential would be passed on to the customer in the form of lower delivered prices: "[D]isparities between the base prices of Southern and Western plywood suggest that the *full* freight advantage is not realized as profit for southern mills (as opposed to cost savings for consumers)...." (91 F.T.C. at 103; emphasis in original) Respondents themselves conceded during the class certification proceedings that

concluded there was nothing to rebut "the common-sense proposition that southern producers would simply adjust the index [*i.e.*, mill] price upwards if they were quoting delivered prices in terms of actual," instead of West Coast freight. (*Id.* at 580, App. J-14)[17]

This likelihood of offsetting adjustments in other elements of price was also stressed in *Albertson's, Inc.* v. *Amalgamated Sugar Co.*, 62 F.R.D. 43 (D. Utah 1973), *aff'd in pertinent part*, 503 F.2d 459, 463 (10th Cir. 1974), where a basing point price system allegedly fixed the freight element of plaintiffs' purchase price.

> "If base point pricing were to be abandoned, *it is clear that [defendants] would have to raise their base price* and not continue to charge the base price at Crockett, California, as the plaintiffs seem to believe."
>
> • • •
>
> "The evidence indicates that some new base price would have to be set which would maintain the percentage return on capital constant with existing levels if defendants are to stay in business." (*Id.* at 53; emphasis added.)

Professor Areeda has observed that proper damage analysis in any antitrust case, whether or not involving freight, must take account of *all* elements of price. Such an analysis may lead to "no net recovery—a result commanded by the necessity of offsetting injuries which plaintiffs may have suffered at the hands of defendants with benefits which they may have derived from the very activities they attack." Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127, 1136 (1976).

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petitioners had not "added a uniform freight charge to a uniform base price to arrive at their delivered prices." (App. D-17)

[17] For example, in the illustration in note 4, a southern producer who had been quoting a delivered price of $95, consisting of an $80 index price plus $15 in West Coast freight, would shift to a $90 index price, plus $5 in actual freight. The delivered price would remain the same.

Professor Areeda's approach, cited with approval in *Brunswick* v. *Pueblo Bowl-O Mat, Inc.*, 429 U.S. 477, 487 n.11 (1977), clearly points to the correct approach in cases involving alleged collusion on something less than the final price. Such cases are already common, and will likely become more so in light of this Court's recent decision in *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980), applying the *per se* rule to such agreements.[18] Significantly, *Catalano* suggested a damages approach identical to that of Professor Areeda, when it recognized that the unlawful agreement to eliminate variable discounts involved in *Catalano* might "ultimately lead in a competitive market to corresponding decreases in the invoice [*i.e.*, base] price," and thus "may turn out to be harmless" to the buyer. (*Id.* at 648-49)[19]

Under the Fifth Circuit's approach, on the other hand, single element price fixing cases would be subject to an automatic damages standard similar to that invalidated in

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[18] *See Albertson's, Inc.* v. *Amalgamated Sugar Co., supra; Jacobi* v. *Bache & Co.*, 377 F. Supp. 86 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 1231 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976); *Wall Products Co.* v. *National Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971); *United States* v. *Cincinnati Fruit & Produce Credit Ass'n*, [1956] Trade Cas. ¶ 68,248 (S.D. Ohio 1956); *In re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127 (5th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Ambook Enterprises* v. *Time Inc.*, 612 F.2d 604 (2d Cir. 1979), *cert. dismissed*, 448 U.S. 914 (1980); *United States* v. *Columbia Pictures Industries, Inc.*, 507 F. Supp. 412 (S.D.N.Y. 1980); *FTC* v. *National Lead Co.*, 352 U.S. 419 (1957); *Chain Institute, Inc.* v. *FTC*, 246 F.2d 231 (8th Cir.), *cert. denied*, 355 U.S. 895 (1957).

[19] *See also Jacobi* v. *Bache & Co.*, 377 F. Supp. 86, 93 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 1231 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976) (although there was agreement to eliminate one form of payment, the fact that other elements of the price were negotiable was "relevant to calculations of the amount of damages"); *Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43, 52-53 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) (in tie-in case plaintiffs could not base their damages on "the amount by which the contract price [on the tied items] exceeded the market price for comparable items," with no offset for the reasonable value of the trademark).

J. Truett Payne Co. v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981). There, the plaintiff in a Robinson-Patman Act case argued that, "once it has proved a price discrimination in violation of § 2(a) it is entitled at a minimum to so-called 'automatic damages' in the amount of the price discrimination." (*Id.* at 561) This Court squarely rejected the argument, holding that the purchaser must establish the actual measure of his damages, which must be geared to "what plaintiff's situation would have been in the absence of the defendant's antitrust violations." (*Id.* at 566)

The Fifth Circuit ignored this basic proposition when it failed to examine whether, or to what extent, the freight and weight differentials were offset by adjustments in mill prices. Instead, the Court treated the measure of damages issue in a single paragraph as one of the relative "credibility" of the parties' respective experts. (655 F.2d at 635, App. A-11) What the Court overlooked is that a jury cannot "accept the testimony of plaintiffs' expert," no matter how "credible" it may seem, if his analysis excludes the factors that must be considered under the governing legal standards. Here, respondents' expert concededly made no effort to determine whether the freight and weight differential was offset by lower mill prices. To the contrary, he testified that the mill price "did not make any difference" to his analysis. (Vol. 53, Tr. 2390-93)

The fallacy of the Fifth Circuit's one-dimensional approach is brought home by the aberrational result. Counsel for the plaintiff class have publicly stated that, during the jury's deliberations, they were prepared to settle for $8 million. (The American Lawyer, Dec. 1981 at 35) In light of counsel's responsibilities to the class, it must be presumed they thought this figure bore a reasoned relationship to the injury suffered. Yet a few hours later, the jury returned a verdict that respondents now claim may be worth $2 billion. Something is seriously wrong with a measure of damages that results in such an extraordinary variance.

What is wrong is that the measure of damages approved by the Fifth Circuit contravenes the fundamental purpose of all remedial law—to put the plaintiff in the same position it

would have been absent the legal violation. While the treble damage remedy also serves deterrent purposes, this is accomplished through the trebling of *actual* damages, not through artificial damage rules that would compensate plaintiffs threefold for injuries they never sustained.

This is not a case where "[t]he vagaries of the marketplace . . . deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation." *J. Truett Payne*, 451 U.S. at 566. Here, no attempt was ever made to estimate "what the plaintiff's situation would have been" absent the challenged conduct. Approximate damage awards based on disputed market *evidence* may be acceptable. Massive damage awards based on a *legal standard* that ignores market realities should not be condoned.

Point III—Petitioners were denied due process by the trial court's handling of bifurcation and its special damage interrogatories.

Review of the proper measure of damages is especially warranted in *this* case because the trial court's handling of the issue effectively precluded its fair hearing and consideration by the jury. *First*, petitioners and Georgia-Pacific did not present evidence on the measure of damages because of their justifiable understanding that this issue had been severed for later trial. *Second*, the issue was submitted to the jury by the trial court in the form of leading interrogatories that left the jury no realistic choice but to adopt the difference between West Coast freight and actual freight, and between estimated weights and actual weights, as the measure of damages.

This Court has held that, "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan* v. *United States*, 304 U.S. 1, 18 (1938). Consistent with this basic right, it is well established that any severance should entail no ambiguity as to what issues are bifurcated for later trial. The lower courts are in accord. "Separate trial of separate issues 'must be grounded upon a clear understanding between court and counsel of the issue or

issues involved in each phase and what proof will be required to pass from one phase to the next.' " *Martin* v. *Bell Helicopter Co.*, 85 F.R.D. 654, 658 (D. Colo. 1980), *quoting Alabama* v. *Blue Bird Body Co.*, 573 F.2d 309, 319 (5th Cir. 1978); *Warner* v. *Rossignol*, 513 F.2d 678, 684 (1st Cir. 1975); *Moss* v. *Associated Transport, Inc.*, 344 F.2d 23, 26 (6th Cir. 1965); *United States* v. *International Business Machines Corp.*, 60 F.R.D. 654, 657 (S.D.N.Y. 1973).

The Fifth Circuit departed from this settled rule when it approved the trial court's submission of the measure of damages issue to the liability jury. Early in the proceedings, the district judge originally assigned stated he would "split the liability and damage phases of these proceedings." (Supp. Vol. 16, Tr. 14162-95) This initial bifurcation was reconfirmed in defendants' view when the district judge who took over the cases entered his pretrial order of March 27, 1978. That order formally severed "for subsequent trial as appropriate . . . the amount of damages sustained by individual plaintiffs, intervenors and class members."[20]

The Fifth Circuit suggests that defendants should have understood the March 27 order as severing only the calculation of individual damages, not the measure of damages applicable to those calculations. (655 F.2d at 635-36, App. A-11) But the court ignored the district judge's post-trial concession that, while he thought he was drawing a distinction between the terms "amount of damages sustained by individual plaintiffs" and "measure of damages,"

> "It may very well be and the Court has no reason to doubt [the] sincerity of defense counsel in equating those two terms." (Vol. 59, Tr. 23,656)

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[20] The trial judge also told prospective jurors that the first jury *would be determining* "whether or not these defendant companies did violate the antitrust laws in the way the plaintiffs claim, and if so, whether that caused impact or damage" to purchasers. By contrast, he emphasized that "The jury *will not be determining* the amount, the dollar amount of any such overcharge." (Vol. 45, Tr. 5-6; emphasis added)

This concession by the trial judge is dispositive, for the due process requirement of notice and opportunity to be heard is concerned with what the *parties* reasonably understood the order to mean. *See Chemical Cleaning, Inc.* v. *Dow Chemical Co.*, 379 F.2d 294, 297 (5th Cir. 1967), *cert. denied*, 389 U.S. 1040 (1968) (damage award cannot stand where defense counsel "was inadvertently lulled into the belief that the issue of damages would be left to be considered separately"); *Dillon* v. *Bay City Constr. Co.*, 512 F.2d 801, 804 (5th Cir. 1975) (even where "the judge did give prior notice of the consolidation" of the preliminary injunction hearing and the trial on the merits, the "confusion [of counsel] resulted in an inadequate hearing because counsel . . . failed to put on even the evidence then available on the merits").

Because of their justifiable understanding of the nature of the bifurcation, defendants offered no evidence on the measure of damages, did not examine their own expert on the issue, limited their cross-examination of respondents' expert to the liability issues, and submitted no proposed jury instructions or interrogatories on measure of damages. Similarly, although respondents offered jury instructions and interrogatories on the liability issues of conspiracy and fact of damage, they offered none with respect to measure of damages. In far less compelling circumstances, the Second Circuit held that an appellant was denied his due process rights to notice and hearing since "he was not given the opportunity to introduce expert witnesses, and he may not have fully cross-examined [other witnesses] as to the issue." *Knapp* v. *McFarland*, 457 F.2d 881, 887 (2d Cir.), *cert. denied*, 409 U.S. 850 (1972).

The error in submitting the measure of damages issue to the liability jury was compounded by the *form* in which it was submitted. The trial court gave *no instructions* on how the jury should arrive at the measure of damages, beyond stating that respondents requested "yes" answers to the following interrogatories, which the trial court *sua sponte* submitted to the jury:

> "2. (a) Did the use of 'West Coast freight' in the pricing of Southern pine plywood during the period

from February 23, 1968, to December 31, 1973, cause financial damage to the purchasers of such plywood?

"(b) If 2(a) is answered 'yes,' was that damage equal to the amount by which 'West Coast freight' exceeded the actual freight charge (or the pick-up allowance)?" (Special Verdict, App. I-2)[21]

The jury was offered no alternative measure of damages nor even an opportunity to indicate whether they believed some other measure would be proper. Because of the leading nature of the interrogatory, the jury was presented with an all-or-nothing proposition. They were precluded from considering the measure of damages that petitioners would have urged (had the issue been tried) and that the law mandates—the difference between the total price as affected by the alleged conspiracy and the total price as it would have existed absent the alleged conspiracy.[22]

Professors Wright and Miller have stressed that the trial court has considerable discretion concerning the nature and scope of issues to be submitted to the jury under Rule 49(a), but only "so long as they present the case fairly." C. Wright & A. Miller, *Federal Practice & Procedure* § 2506, at 498-99 (1971). Here, the special verdict form presented the damage issue in a one-sided and prejudicial manner. Especially in light of the economically irrational measure of damages that the interrogatories led the jury to adopt, a grant of certiorari is appropriate to ensure that petitioners are given the opportunity fairly to present their evidence and theories on this crucial issue.

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[21] Precisely parallel questions were posed concerning the damages resulting from the use of standardized weights in the pricing of western plywood. (Special Verdict ¶¶ 4(a) & (b), App. I-3).

[22] One can only speculate what would have happened if the jury had found for respondents on fact of damage, but rejected the trial court's suggested measure of damages. It is hard to imagine, however, that *respondents* would have been precluded (as petitioners have been) from urging a different measure at the subsequent damages trial.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

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Dated: March 2, 1982

Petitioners have filed a Joint Appendix with Georgia-Pacific Corp., which is also filing a petition for writ of certiorari.

APPENDIX I

In the

United States District Court

Eastern District of Louisiana

IN RE PLYWOOD ANTITRUST LITIGATION	}	DML Docket No. 159 (All Cases)

SPECIAL VERDICT

WE, THE JURY, UNANIMOUSLY FIND AS FOLLOWS:

1. (a) Was the use of "West Coast freight" in the pricing of Southern pine plywood during the period from February 23, 1968, to December 31, 1973, the result of a conspiracy between two or more manufacturers of softwood plywood?.. YES (yes or no)

(b) If 1(a) is answered "yes", which plywood manufacturers were parties to that conspiracy?

—Georgia-Pacific Corporation?..... YES (yes or no)

—Weyerhaeuser Company? ..... YES (yes or no)

—Willamette Industries, Inc.?..... YES (yes or no)

—all other manufacturers of softwood plywood? ..... NO (yes or no)

—some other manufacturer(s) of softwood plywood? If answered "yes", which other manufacturer(s)? ..... YES (yes or no)

Southern Pine Plywood Manufacturers

2. (a) Did the use of "West Coast freight" in the pricing of Southern pine plywood during the period from February 23, 1968, to December 31, 1973, cause financial damage to the purchasers of such plywood? ..... YES (yes or no)

(b) If 2(a) is answered "yes", was that damage equal to the amount by which "West Coast freight" exceeded the actual freight charge (or the pick-up allowance)? ..... YES (yes or no)

3. (a) Was the use of "standard weights" in the pricing of Western fir plywood during the period from February 23, 1968, to December 31, 1973, the result of a conspiracy between two or more manufacturers of softwood plywood? YES (yes or no)

(b) If 3(a) is answered "yes", which plywood manufacturers were parties to that conspiracy? ..... YES (yes or no)

—Georgia-Pacific Corporation? ..... YES (yes or no)

—Weyerhaeuser Company? ..... YES (yes or no)

—Willamette Industries, Inc.? ..... YES (yes or no)

—all other manufacturers of softwood plywood? If answered "yes", which other manufacturer(s) ..... NO
(yes or no)

4. (a) Did the use of "standard weights" in the pricing of Western fir plywood during the period from February 23, 1968, to December 31, 1973, cause financial damage to the purchasers of such plywood? ..... YES
(yes or no)

(b) If 4(a) is answered "yes", was that damage equal to the amount by which freight calculated on the basis of "standard weight" exceeded the actual freight charge? ..... YES
(yes or no)

/s/ DALE A. GUIDRY
Foreman

Joint Appendix

81-1618 81-1619

Nos. _____ and _____

FILED
MAR 2 1982
ALEXANDER L. STEVAS,
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In the

Supreme Court of the United States

OCTOBER TERM, 1981

WEYERHAEUSER COMPANY and
WILLAMETTE INDUSTRIES, INC.,
Petitioners,

vs.

LYMAN LAMB COMPANY, et al.,
Respondents.

GEORGIA-PACIFIC CORPORATION,
Petitioner,

vs.

LYMAN LAMB COMPANY, et al.,
Respondents.

JOINT APPENDIX TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

In the

United States Court of Appeals

For the Fifth Circuit

Nos. 80-3234 to 80-3237

In re PLYWOOD ANTITRUST LITIGATION

FRENCH QUARTER APARTMENTS, LTD., et al.,
Plaintiffs-Appellants,
vs.
GEORGIA-PACIFIC CORPORATION, et al.,
Defendants-Appellant.

GEORGIA-PACIFIC CORPORATION,
Defendant-Appellant,
vs.
KOHN, SAVETT, MARION & GRAF, P.C., et al.,
Movants-Appellees.

WILLAMETTE INDUSTRIES, INC.,
Defendant-Appellant,
vs.
KOHN, SAVETT, MARION & GRAF, P.C., et al.,
Movants-Appellees.

LYMAN LAMB CO., et al.,
Plaintiffs-Appellees,
vs.
GEORGIA-PACIFIC CORPORATION, et al.,
Defendants-Appellants.

Unit A
Sept. 8, 1981.

Before
Ingraham, Politz and Williams,
Circuit Judges

INGRAHAM, Circuit Judge:

Three consolidated appeals, Nos. 80-3235, 80-3236 and 80-3237, arise out of (1) judgements entered in favor of four representative members of certified classes of plywood

purchasers and against defendants-appellants Georgia-Pacific Corporation, Weyerhaeuser Company, and Willamette Industries, all of whom are softwood plywood manufacturers, following a special jury verdict finding that defendants had engaged in a price fixing conspiracy in violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), and (2) judgments imposing monetary sanctions against Georgia-Pacific and Willamette for failure to provide discovery. Another appeal, No. 80-3234, consolidated for purposes of oral argument with the abovementioned three, arises out of a judgment entered in favor of the abovenamed defendants and against certain plaintiffs who were indirect purchasers of plywood with respect to those defendants.

Appeals Nos. 80-3235, 80-3236 and 80-3237 will be referred to collectively as the *Lyman Lamb* case. Appeal No. 80-3234 will be referred to as the *French Quarter Apartments* case. Both of these cases are part of a multidistrict litigation proceeding that began as a class action on behalf of various plywood purchasers. Several similar actions were filed in district courts around the country and ordered consolidated in the Eastern District of Louisiana by the Judicial Panel on Multidistrict Litigation. *In re Plywood Antitrust Litigation*, 376 F. Supp. 1405 (Jud.Pan.Mult.Dist.Lit. 1974). Certain final judgments were entered by the district court on February 21, 1980, and certified pursuant to Fed.R.Civ.P. 54(b). Nonprevailing parties perfected these appeals from those judgments. We now affirm the judgment of the district court with respect to each appeal.

I. THE LYMAN LAMB CASE

A. Procedural Context

This litigation commenced in the Eastern District of Louisiana in 1972 as a class action on behalf of plywood purchasers who claimed damages by reason of a price fixing conspiracy involving softwood plywood manufacturers. Numerous similar actions subsequently were filed in various district courts and eventually were ordered consolidated in

the Eastern District of Louisiana. In 1976 Judge Cassibry certified the plaintiffs' classes. *In re Plywood Antitrust Litigation*, 76 F.R.D. 570 (E.D. La. 1976). Thereafter, the actions were reassigned to Judge Pointer who, following defendants' motions to decertify the classes, confirmed the prior certification but redefined the class to include only direct purchasers. With the exception of defendants-appellants herein, the class claims against all other defendant softwood plywood manufacturers were resolved prior to trial.

Trial commenced on October 16, 1978, on "all issues except the amount of damages sustained by individual plaintiffs, intervenors, and class members," and concluded with a special verdict on November 14, 1978. The jury determined that defendants Georgia-Pacific, Weyerhaeuser, and Willamette, together with all other manufacturers of southern plywood, had engaged in a conspiracy in restraint of trade from February 23, 1968, to December 31, 1973 (the damage period), and that the conspiracy caused financial damage to purchasers of southern plywood equal to the amount by which "west coast freight" (freight computed as though the product were shipped from the west coast) exceeded actual freight charges from southern shipping points (such excess being referred to herein as "phantom freight" or "freight pickup"). Similarly, the jury determined that the conspiratorial use of "standard weights" by manufacturers of western fir plywood during the damage period caused financial damage to purchasers thereof in the amount by which freight charges calculated on the basis of "standard weights" exceeded the actual freight costs incurred by defendant manufacturers (such excess being referred to herein as "underweights").

Defendants subsequently moved for judgment notwithstanding the verdict and for a new trial. In a memorandum opinion the district court denied both motions, *In re Plywood Antitrust Litigation*, 1979-1 Trade Cas (CCH) ¶62,459 (E.D. La. 1978), and entered an interlocutory judgment in favor of plaintiffs on the special verdict. The court expressly noted

that the evidence was "sufficient not merely to create a jury issue but also to cause [the district court], like the jury, to find that there was a conspiracy and that the three defendants were parties to that conspiracy." Thereafter four members of the plaintiff classes, the Lyman Lamb Company and the other three appellees, each moved for summary judgments as to individual damages computed in accordance with the jury verdict.[1] The district court in a memorandum opinion dated February 14, 1980, granted the motions and subsequently entered pursuant to Fed. R. Civ. P. 54(b) the February 21, 1980 judgments from which all three defendants now jointly appeal in No. 80-3237.

Prior to trial plaintiffs moved for entry of judgment against defendants Georgia-Pacific and Willamette for failure to produce various documents during discovery. The district court declined to enter adverse judgments as sanctions but, after briefing and hearing, granted plaintiffs' counsel an award of fees and expenses incurred by reason of the failure of Georgia-Pacific and Willamette to provide the requested discovery. Pursuant to Fed. R. Civ. P. 54(b), the court entered judgment against each of those defendants on February 21, 1980, from which Georgia-Pacific and Willamette respectively appeal in No. 80-3235 and No. 80-3236.

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[1] The damage figures set out below were stipulated to by the parties as the appropriate amounts prior to trebling if the jury's verdict is permitted to stand. To ensure that a favorable ruling on their motion for summary judgment would have the finality necessary to support an immediate appeal by the defendants, plaintiffs waived below any claim to injunctive relief. Nor, for the same reason, was an award of attorneys' fees sought on behalf of the four movants, it being agreed by defendants, however, that the time spent in connection with these claims could be included in subsequent claims for fees on behalf of other class members. Subject to those understandings, damages were awarded as follows:

Lyman Lamb Co.	$ 47,952.59
Plywood Distributing Co.	102,813.78
Baton Rouge Lumber Co.	216,448.56
City of Arkadelphia, Arkansas	89.46

B. Appeal No. 80-3237—Judgment on the Merits

Synthesizing the statements of the issues contained in the appellate briefs of the parties, we find that the concerns relevant to the disposition of this appeal fall into three general categories: those relating to proof of the existence *vel non* of a statutory violation; those relating to proof of impact *vel non* on plaintiffs' business; and those relating to evidentiary admissions and jury instructions by the district court. We deal with each of these categories in turn.

1. The Statutory Violation

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), provides that "every contract, combination . . . or conspiracy in restraint of trade or commerce . . . is . . . illegal." The term "every" is not to be taken literally; instead the standard of reasonableness has been adopted to judge the lawfulness of the result. *Standard Oil Co.* v. *United States,* 221 U.S. 1, 66, 31 S.Ct. 502, 518, 55 L.Ed. 619 (1911). Certain practices, however, have such a "pernicious effect on competition," *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed. 2d 545 (1958), that they are considered to be per se violations of section 1 of the Sherman Act. Among these practices is price fixing, *United States* v. *Trenton Potteries,* 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927), and the machinery employed to achieve that end is immaterial, *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 210, 60 S.Ct. 811, 838, 84 L.Ed. 1129 (1940). These long-standing principles enjoy full vitality today. *See Catalano, Inc.* v. *Target Sales, Inc.,* 446 U.S. 643, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980).

In response to special interrogatories, the jury returned a verdict that defendants were engaged, along with other softwood plywood manufacturers, in a conspiracy to fix prices. Defendants attack the viability of this verdict, asserting that plaintiffs produced no evidence, either direct or circumstantial, of any such conspiracy. Accordingly, they contend that it was error for the district court to deny their motion for judgment notwithstanding the verdict. Our

standard for review of that denial by the district court is well known. Considering all of the evidence in the light most favorable to the nonmoving party,

> If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury . . . . [I]t is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses. *Boeing Co.* v. *Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

We find that there is substantial evidence, as defined in the quotation above, from which a reasonable jury, both directly and circumstantially, could find the existence of a conspiracy to fix prices. It does not strain credulity that solemnized covenants to conspire are difficult to come by in any price fixing case. Plaintiffs have, nevertheless, unearthed damaging evidence from the mouths, or typewriters, of defendants' own employees.

In 1971, James Tweedie, Softwood Plywood Product Manager for Weyerhaeuser, received an internal memorandum from Wayne Marcella, which begins as follows:

> Jim, my apologies for the delayed response on our various conversations regarding Georgia-Pacific. As you know, at the American Plywood Association meeting in Biloxi, Mississippi I made it a point to spend considerable time with [Georgia-Pacific plywood sales managers] Tom Nash and Bill Fuller. The following outlines the highlights of our conversations which ranged from customer commitments to plywood marketing practices.

The memo concludes with the following assurance: "The communication channels developed through Tom Nash and Bill Fuller offers [sic] an opportunity to secure specific competitive information. Therefore, it is my intention to keep this direct contact open through weekly phone conversations."

A 1969 memorandum sent to James Tweedie informs him that Georgia-Pacific personnel "have adopted the following price basis. Low Crow's less 5% less 3% plus West Coast freight. This applys [sic] in truck lots (Mill) &/or pick up at the local Columbia warehouse." A 1971 internal memorandum from F.V. Langfitt, Jr., Vice President of Sales, Georgia-Pacific, to Tom Nash reveals the following: "Jimmy Schmidt, Sales Manager for Boise [Cascade]'s Southern Pine Mill in North Carolina, was in the office last week and indicated that they are making all of their 1/2" in 3-Ply construction and are selling it all at not to exceed $1.00 under 4-Ply/5Ply."

A 1970 memorandum from K.C. Sisson to R.W. Stewart, both of Weyerhaeuser, contains the following language:

> We have been attempting to secure information regarding Georgia-Pacific's Intermediate Glue Line and pricing for this product.
>
> . . . .
>
> Today I contacted an old acquaintance at Georgia-Pacific's Portland office, Don Martin. Don offered the following information:
>
> > They are currently manufactuing the Intermediate Glue Line, on their sheathing production at their Corvallis, Oregon mill. . . . They price the IMG $2.00 to $3.00 under their exterior level.

A copy of the memorandum was sent to James Tweedie and Wayne Marcella.

In response to a rumor that some manufacturer was deviating from the industry's practice of west-coast freight pricing, a 1972 Georgia-Pacific memorandum from Mr.

Trammel, a Regional Sales Manager, to Winston Purifoy, asks the latter the following question: "Tom Mateo advises he has heard of some Arkansas plywood mills shifting to an FOB mill pricing policy. Do you know anything about this?" Mr. Purifoy responded as follows:

> Negative. I had not heard this and called all plants. Big W[eyerhaeuser] is now encouraging their more distant truck customers to make mill pick-ups in return for an allowance. They thus are dropping their truck customers in poor freight gain areas.

A 1972 memorandum authored by James Tweedie and directed to L.V. Imhoff begins as follows:

> As a segment of our southern mill intelligence trip, a visit was scheduled with Winston Purifoy, Vice President-Sales, Southern Plywood-Particleboard, and Bill Fuller, Plywood Sales Manager [both of Georgia-Pacific]. It was a very cordial visit and one which was very informative to us. Listed below are some of the subjects discussed and their input.

Mr. Tweedie then reports the substance of his communications with Georgia-Pacific officials regarding pricing, sales practices, and numerous other aspects of Weyerhaeuser's chief competitor's operations. The memorandum concludes with the following appraisal:

> It was a good exchange and the connection has been made to keep in touch without exposing our individual companies to any risks. Wayne Marcella [Weyerhaeuser] will stay close to Bill Fuller [Georgia-Pacific] and monitor what is happening in the south. With this connection, we should be able to round out our information on this company as it relates to plywood and more especially the south.

Without belaboring the point by citation of futher examples, the record contains documents from which a reasonable jury could find that defendants and other softwood plywood manufacturers were engaged in a conspiracy to fix prices in

violation of section 1 of the Sherman Act. Moreover, we have held previously that "proof of a conspiracy under § 1 of the Sherman Act does not require the existence of an express agreement.... It is 'enough that, knowing that concerted action was contemplated and invited, the [defendants] gave their adherence to the scheme and participated in it.'" *Gainesville Utilities Dept.* v. *Florida Power & Light Co.*, 573 F.2d 292, 300 (5th Cir.), *cert. denied*, 439 U.S. 966, 99 S.Ct. 454, 58 L.Ed.2d 424 (1978) (citations omitted). The parallel pricing conduct clearly demonstrated in the record plus the numerous items of direct evidence of communication between high-level personnel on pricing policy adequately support the jury's verdict. *Cf. id.*, 575 F.2d at 301 and n.13 (evidence points so strongly to the existence of a conspiracy that reasonable men could not arrive at a contrary verdict).

2. The Impact on Plaintiffs' Business

Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), provides that "any person who shall be injured in his business or property by reason or anything forbidden in the antitrust laws may sue therefor... and shall recover three-fold the damages by him sustained." To prevail in an antitrust action, a plaintiff must show both an injury to his business resulting from the defendants' wrongful actions, and some indication of the amount of damage done. *See Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d 16, 20 (5th Cir. 1974). These two elements of impact may be characterized as fact of damage and measure of damage.

As to the former element, defendants contend that plaintiffs failed to meet their burden of proving the fact of damage *with certainty*. Certainty, however, was not the burden of persuasion that plaintiffs had to meet. To satisfy the first element of impact, plaintiffs had only to persuade the jury *by a preponderance of the evidence* that defendants' price fixing conspiracy injured them in their business or property. *E.g., Gainesville Utilities Dept.* v. *Florida Power & Light Co.*, 573 F.2d at 294 n.3, 304-05.

Fact of damage is a question of the sufficiency of the evidence. *Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d at 20. Where, as here, plaintiffs prove a statutory violation in the form of a price fixing conspiracy with respect to a homogeneous or fungible product that was marketed in a similar manner throughout the country, it is not unlikely that plaintiffs also will be able to prove by a preponderance of the evidence that purchasers of the product in question were injured in their property or business. *See Alabama* v. *Blue Bird Body Co.*, 573 F.2d 309, 324 (5th Cir. 1978). Indeed, an independent review of the record before us reveals substantial evidence from which a reasonable jury could find that present plaintiffs were thusly injured when they purchased softwood plywood from these defendants and their co-conspirators. Plaintiffs' expert economic witness so testified at trial, in contraposition to the testimony of defendants' expert witness. The jury accepted the credibility of the former and rejected that of the latter. We find no basis for disturbing the jury's verdict on appeal.

Defendants also argue that there was insufficient evidence to support plaintiffs' claimed measure of damages, *i.e.*, the amount of phantom freight and underweights paid by plaintiffs to defendants. We disagree. As we recently held in *Malcolm* v. *Marathon Oil Co.*, 642 F.2d 845, 858 (5th Cir. 1981), once anti-trust plaintiffs have proved the fact of damage, their burden on proving the measure of damages becomes lighter. "The amount of damage may be shown by just and reasonable inference with juries voting upon the probable and inferential as well as upon direct and positive proof." *Id* (citing *Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d at 23-24). "In fact, given proof of the fact of damage, proof of losses which border on the speculative is allowed in order to facilitate the policy of the anti-trust laws." *Id.* (citing *Hobart Bros. Co.* v. *Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 903 (5th Cir.), *cert. denied*, 412 U.S. 923, 93 S.Ct. 2736, 37 L.Ed.2d 150 (1973).

Plaintiffs' expert witness testified that if competition had been at work in the plywood industry during the damage period, it would have eliminated the ability of defendant plywood manufacturers to realize additional revenue in the amount of the phantom freight charged on the sale of southern plywood. Likewise, plaintiffs' economist testified that the effect of the conspiratorial use of underweights in the delivered pricing of western plywood was to increase the price paid by buyers by the amount of those underweights. The jury chose to accept the testimony of plaintiffs' economist and to reject the contrary testimony of defendants' economist. Based on the evidence in the record before us, we cannot say that it was unjust or unreasonable for the jury to so conclude. *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 264-65, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946).

Finally, defendants argue that it was reversible error for the district court even to submit the question of measure of damage, as distinct from that of fact of damage, to the jury. In its pretrial order of March 27, 1978, the district court advised all parties that trial was set for October 16, 1978, over one-half year later, *"upon all issues except the following, which are severed* for subsequent trial as appropriate: (1) *amount of damages sustained by individual* plaintiffs, intervenors, and class members." Plaintiffs went to trial contending that the alleged conspiracy caused them injury in the form of overcharges of phantom freight and underweights. Defendants tried to convince the jury that their pricing system caused no economic injury to anyone. The jury, agreeing with plaintiffs and disagreeing with defendants, returned its special verdict upholding plaintiffs' theory. Having failed to persuade the first jury that their challenged practices caused damage to no one, defendants now seek the opportunity to convince a different jury that some other measure of damages is appropriate.

This court has already established the principle that, in a bifurcated proceeding, the issue or issues to be tried separately in the second trial must be so distinct and separable from

the others that a trial of it or them alone may be had without injustice. "Such a rule is dictated for the very practical reason that if separate juries are allowed to pass on issues involving overlapping legal and factual questions the verdicts rendered by each jury could be inconsistent." *Alabama* v. *Blue Bird Body Co.*, 573 F.2d at 318. *See Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188 (1931); *Swofford* v. *B & W, Inc.*, 336 F.2d 406 (5th Cir. 1964), *cert. denied*, 379 U.S. 962, 85 S.Ct. 653, 13 L.Ed.2d 557 (1965).

In reaching a decision on plaintiffs' theory of injury, the jury necessarily had to resolve plaintiffs' claim that defendant manufacturers' addition of west coast freight to the selling price of southern pine plywood shipped from southern mills, and their use of standard weights in the pricing of western fir plywood, increased those prices. Allowing a second jury to consider some alternative measure of damage preferred by defendants would unavoidably involve reconsideration of those issues, an outcome impermissible under *Blue Bird*. At present, the issue remaining before the district court involves only the mathematical computations that must be performed upon the transactional details of the individual purchasers and purchases. Resolution of those issues, whether by jury, court, or stipulation, will not implicate the integrity of the original jury verdict. We find no error in the district court's bifurcation procedure or in its submission to the jury of the measure of damage. *Cf. In re Corrugated Container Antitrust Litigation*, 1980-81 Trade Cas. (CCH) ¶ 63,669 (S.D. Tex. 1980) (jury permitted to determine liability, impact, and measure of damage, with exact dollar amounts of damage awards to be computed later).

3. Evidentiary Admissions and Jury Instructions

The remainder of the defendants' issues in appeal No. 80-3237 of the *Lyman Lamb* case deal with the admission of certain evidence and with certain instructions by the district court of the jury. First, defendants complain that the court

committed prejudicial error by allowing plaintiffs to introduce the findings of an Administrative Law Judge adopted by the Federal Trade Commission in an opinion concluding proceedings against these and other plywood manufacturers pursuant to section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976).[2] We disagree.

The district judge carefully and extensively edited from those findings any finding that indicated or tended to indicate the Commission's conclusions or the outcome of the proceedings. He also edited the findings to eliminate any possible prejudice to defendants. The findings that were admitted were limited to historical and objective descriptions of the industry, production statistics, and industry practices. They neither stated nor implied that the practices were or were not collusive or anticompetitive in origin, operation, or effect. Morever, the admitted findings were simply cumulative in nature. With insignificant exceptions, the admitted

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[2] *Boise Cascade Corp.*, 91 F.T.C. 1 (1978). The Commission there found that the same practices as challenged by plaintiffs here were unfair methods of competition under § 5 of the Federal Trade Commission Act and enjoined their continuance. The Ninth Circuit declined to enforce the Commission's order. *Boise Cascade Corp.* v. *FTC*, 637 F.2d 573 (1980). Defendants argue that "the Ninth Circuit findings, when they become final, should collaterally estop plaintiffs in this action on every principal issue." We reject that position. The FTC proceeding tested the conduct of these defendants and others under § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976). Plaintiffs brought suit against these defendants and others under § 1 of the Sherman Act, 15 U.S.C. § 1 (1976). The Commission expressly declined to reach the conspiracy issue, stating that it was unnecessary to a determination under § 5. *Boise Cascade Corp.*, 91 F.T.C. at 102. Here, plaintiffs proved a conspiracy to the satisfaction of the jury and of the district court. The record evidence presented to the jury and court below included testimony by witnesses who did not appear before the Commission. Significantly, the FTC staff presented no expert testimony in support of its case, whereas plaintiffs below put their expert economist before the jury. In short, we are not bound by the Ninth Circuit's opinion in *Boise Cascade*.

findings were supported by independent evidence in the record.

The court carefully instructed the jury that the findings were the result of an *inquiry* into the pricing practices in the plywood industry, the "outcome and results of [which] really are not of significance or consequence here to this case." He also stated that they were not binding upon the jury, but that "they may be received as evidence instead of, for example, having a witness testify to those matters or instead of having a document introduced to show it. It is simply evidence to be considered by you along with all the other evidence in the case."

We also conclude that it was not an abuse of the district court's discretion to admit the findings under Fed. R. Evid. 803(8)(C). *Cf. Chandler* v. *Roudebush*, 425 U.S. 840, 863 n.39, 96 S.Ct. 1949, 1960, 48 L.Ed.2d 416 (1976) (administrative findings with respect to employment discrimination claim admissible); *Lloyd* v. *American Export Lines, Inc.*, 580 F.2d 1179, 1183 (3rd Cir.), *cert. denied*, 439 U.S. 969, 99 S.Ct. 461, 58 L.Ed.2d 428 (1978) (findings in Decision and Order of Coast Guard hearing examiner admissible); *United States* v. *School District of Ferndale*, 577 F.2d 1339, 1354-55 (6th Cir. 1978) (findings of Department of Health, Education, and Welfare hearing examiner in school-segregation fund-termination proceeding admissible). Furthermore, defendants came forward with no evidence sufficient to impugn the trustworthiness of the proffered findings. *See Melville* v. *American Home Assurance Co.*, 584 F.2d 1306, 1316 (3rd Cir. 1978). Defendants' arguments on this issue fail.

Defendants also complain about the court's charge to the jury in two particulars. First, they contend that it was improper even to give the jury an instruction on the meaning of the term "contract" as it is used in section 1 of the Sherman Act, since supposedly there was no evidence in the record of any contract containing, referring to, or suggesting an agreement to use west coast freight or standard weights.

Our examination of the record, however, discloses examples of exactly the sort of document whose existence defendants deny—memoralizations of agreements mutually to preserve freight pickup (phantom freight) on intercompany sales for resale, and even offers to contract for intercompany sales, guaranteeing certain levels of freight pickup, for the expressly stated reason of "doing everything possible to stabilize prices, especially in those markets close to the plant" where the offeror was experiencing price cutting. It was not error for the court to instruct the jury on the meaning of the term "contract" as used in section 1 of the Sherman Act.

Finally, defendants contend that the court charged the jury that it could consider contracts between manufacturers and opportunity contacts *in themselves* as evidence of a conspiracy. We do not read the record in this way. The learned district judge charged the jury that "these transactions, these contracts, in and of themselves are not illegal. Indeed, they may be vehicles for fostering competition." Phrasing in the conjunctive, he then charged that "such matters may also be conduct that, when viewed on their own *and in the light of the other evidence,* indicate that there were agreements, express or implied, reached between manufacturers that they would use, in selling plywood to others, West Coast freight or standard weights." The learned judge then proceeded at length to stress that intercompany sales agreements and trade meetings were not *in and of themselves* evidence of illegality under the Sherman Act. "We are convinced from a careful reading of the entire charge that it was, in substance, correct." *Associated Radio Service Co.* v. *Page Airways, Inc.*, 624 F.2d 1342, 1358 (5th Cir. 1980), *cert. denied,* U.S. , 101 S.Ct. 1740, 68 L.Ed.2d 226 (1981). *See Andry* v. *Farrell Lines, Inc.*, 478 F.2d 758 (5th Cir. 1973) (if charge viewed as a whole correctly instructs on the law, even though portion be technically imperfect, no harmful error is committed).

C. Appeals Nos. 80-3235 and 80-3236—Discovery Sanctions

Defendants Georgia-Pacific and Willamette have taken separate appeals from judgments entered by the district court imposing sanctions for their failure to cooperate fully in discovery. In the case of Georgia-Pacific, the failure related to monthly tabulations, known as invoice registers, that recorded freight pickup (phantom freight) realized by the company on each individual sale. With respect to Willamette, the failure related to comparable tabulations of underweights realized on shipments of western fir and southern pine plywood. Each party was fined $10,000 plus certain minor expenses.

Fed.R.Civ.P. 37(d) provides in pertinent part that "[i]f a party . . . fails . . . to serve answers or objections to interrogatories . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just." Plaintiffs moved for judgment against each of these defendants on the basis of its failure forthrightly to reveal the existence of the subject documents, despite several discovery attempts to ascertain their existence. The district court declined to grant judgment against defendants, but instead imposed the far lesser sanction of awarding to plaintiffs' counsel a reasonable if somewhat conservative estimate of their expenses incurred in ultimately ferreting out the documents.

Our standard for reviewing the propriety of these sanctions is whether the district court abused its discretion in imposing them. *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642, 96 S.Ct. 2778, 2780, 49 L.Ed.2d 747 (1976). On the facts of this case and after a careful review of the record, including the hearing on the motion, we cannot say that we are left with the definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached after its weighing of the relevant factors. *See Dorey* v. *Dorey*, 609 F.2d 1128, 1135–36 (5th Cir. 1980). *Cf. Airtex Corp.* v. *Shelley Radiant*

Ceiling Co., 536 F.2d 145, 154–55 (7th Cir. 1976) (under appropriate circumstances, evasive and incomplete answers to interrogatories are tantamount to no answers at all). We affirm the judgment of the district court awarding to plaintiffs' counsel discovery sanctions against Georgia-Pacific and Willamette.

II. THE FRENCH QUARTER APARTMENTS CASE, NO. 80-3234

Appellants in this case are certain of the Oklahoma builder-developer plaintiffs who filed an action on November 6, 1974, in the United States District Court for the Western District of Oklahoma,[3] alleging violations of section 1 of the Sherman Act by the appellee plywood manufacturers, producing damages in their business and property compensable under section 4 of the Clayton Act. The alleged violations involve the same use of phantom freight and standard weights as that complained of in the *Lyman Lamb* case. Prior to the filing of a responsive pleading, the litigation was conditionally transferred to the United States District Court for the Eastern District of Louisiana for consolidated pretrial proceedings under MDL Docket No. 159.

After nearly three years of pretrial discovery by these parties, the Supreme Court handed down its decision in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977).

Nearly five months later, defendants moved under Fed.R.Civ.P. 56 for summary judgment against twenty-nine of the Oklahoma builder-developer plaintiffs on the ground that they were indirect purchasers and therefore were barred from recovering any alleged damages by the rule of *Illinois Brick*. Some of those twenty-nine plaintiffs responded to the summary judgment motion with affidavits, arguably contradictory to their previous interrogatory answers, asserting that they had purchased plywood from defendants both on a

[3] *American Millwork Co.* v. *Boise Cascade Corp.*, No. CIV-74-948.

direct and on an indirect basis. The remainder of the twenty-nine plaintiffs, concededly indirect purchasers, resisted the summary judgment motion on the ground that Congress soon would overturn legislatively the Supreme Court's decision in *Illinois Brick*. These indirect-purchaser in plaintiffs argued that "[i]f the Court were to grant defendants' Motion now, the Court and all counsel may well find themselves faced with the task of putting the pieces back together months from now. *[sic]* Particularly since legislative attempts to overrule *Illinois Brick* are retroactive."

Finding a genuine issue of material fact with respect to those plaintiffs asserting direct-purchaser status, the district court denied the motion for summary judgment as against them. Finding no genuine issue of material fact with respect to the concededly indirect-purchaser plaintiffs, the district court in pretrial proceedings on March 30, 1978, granted defendants' motion as against these plaintiffs. On February 21, 1980, the district court entered its memorandum of opinion reaffirming its March 30 ruling and directed the entry of an adverse final judgment under Fed.R.Civ.P. 54(b) against those indirect-purchaser plaintiffs who are appellants here.

In their appellate briefs, indirect-purchaser plaintiffs argue at length that their claims are not foreclosed as a matter of law by the Supreme Court's decision in *Illinois Brick*. In *Illinois Brick*, the court reaffirmed the principles of *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), barring the defensive use of "passing on" and applied them to indirect-purchaser plaintiffs attempting to use "passing on" offensively against remote defendants. In *Hanover Shoe*, the Court "indicated the narrow scope it intended for any exception to its rule barring pass-on defenses by citing, as the only example of a situation where the defense might be permitted, a pre-existing cost-plus contract." *Illinois Brick*, 431 U.S. at 736, 97 S.Ct. at 2069. Raising the same bar against offensive "passing on" in *Illinois Brick*, the Court retained the "narrow scope" of any exception to the rule: "*Hanover Shoe*,

itself implicitly discouraged the creation of exceptions to its rule barring pass-on defenses, and we adhere to the narrow scope of exemption indicated by our decision there." *Id.* at 745 97 S.Ct. at 2074.

Appellants contend that the exception to the *Illinois Brick*, bar, albeit narrow, extends to cases other than those involving pre-existing cost-plus contracts *per se*. They contend that *Hanover Shoe* and *Illinois Brick* permit the offensive assertion of "passing on" in situations that are the functional equivalent of the cost-plus contract case. Not surprisingly, then, appellants now assert that *their* purchasing situation was the functional equivalent of a cost-plus contract and argue that it thus was error for the district court to grant summary judgment adverse to them.

The initial defect in this argument is that appellants press it for the first time before this court on appeal. Absent exceptional circumstances, appellate courts refuse to consider an issue raised for the first time on appeal. *Matter of Novack*, 639 F.2d 1274, 1276-77 & n.5 (5th Cir. 1981); *Commercial Credit Business Loans, Inc.* v. *St. Louis Terminal Field Warehouse Co.*, 514 F.2d 75, 77 (5th Cir. 1975); *Adams v. Askew*, 511 F.2d 700, 705 & n.9 (5th Cir. 1975).

After thoroughly reviewing the voluminous record, we find no exceptional circumstances that would in any way justify our departure from this well-settled rule. Following the rendition of *Illinois Brick*, despite ample opportunity to do so, indirect-purchaser plaintiffs never moved the district court for permission to amend their pleadings pursuant to Fed.R.Civ.P. 15(a) and thereby to allege any reason, factual or legal, why their case lay without the bar imposed by *Illinois Brick*. They never argued to the district court that their purchasing relationships with their middlemen-suppliers were the functional equivalent of a pre-existing cost-plus contract situation. Following entry of the adverse final judgment on February 21, 1980, they never moved the district court to alter or amend its judgment pursuant to Fed.R.Civ.P. 59(e).

Appellants now attempt to argue that reversal of the district court is compelled by our treatment of *In Re Beef Industries Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), *cert. denied* ____ U.S. ____, 101 S.Ct. 280–81, 66 L.Ed.2d 137 (1980). *Beef Industries* involved an antitrust action by sellers against allegedly monopsonistic and oligopsonistic remote buyers. Plaintiffs there, cattle ranchers, cattle feedlot owners, and both, alleged that the indirect-buyer defendants, retail food chain stores, conspired to fix the prices at which they purchased carcass beef from packinghouses and slaughterers, and that the packinghouse and slaughter middlemen in turn set the prices at which they bought fat cattle from plaintiffs by rigidly applying certain formulae to the defendants' offering prices for carcass beef.

The district court in *Beef Industries* dismissed plaintiffs' action *on the pleadings*. We reversed, finding that plaintiffs had adequately alleged a cause of action within the cost-plus exception to *Hanover Shoe* and *Illinois Brick*. We held the pleadings sufficient because the strict formula buying allegedly rigidly practiced by the *middlemen* in their purchasing relationships with *plaintiffs* was the functional equivalent of the cost-plus contract situation. If plaintiffs there were successful in proving their case *as alleged*, they would have demonstrated that the impact of the illegal overcharge was determined in advance without reference to the interactions of supply and demand. "When the impact of an overcharge on a middleman's pricing decisions can be so determined, the uncertainties involved in resorting to general economic theorems are avoided and the clarity of the evidence virtually eliminates the possibility of overlapping liabilities as the result of inconsistent verdicts in separate lawsuits." *Beef Industries*, 600 F.2d at 1164. Thus were certain plaintiffs successful in avoiding the bar erected by *Hanover Shoe* and *Illinois Brick*, for purposes of testing the sufficiency of their pleadings.

Other *Beef Industries* plaintiffs, however, were not so successful. The complaints at issue there did not allege that

feeders or brokers (certain of the various plaintiffs) passed on price depressions to ranchers who themselves did not deal with the slaughterer and packinghouse middlemen. We therefore held that "[u]nder the allegations of the complaint only those plaintiffs who sold directly to the packers or slaughterers that engaged in strict formula buying are entitled to maintain damage claims." *Id.* at 1167.

Appellants in the present case share the same shortcoming that afflicted the unsuccessful plaintiffs in *Beef Industries:* they simply have not alleged a viable cause of action under *Hanover Shoe-Illinois Brick.* Even as regarded those plaintiffs in *Beef Industries* whose pleadings were sufficient, we expressed the following *caveat:*

> We emphasize that we are not ruling that these plaintiffs were entitled to go to trial. The Supreme Court intended that it be determined early in the litigation whether (or to what extent) a party should be entitled to present a pass-on theory at trial. The defendants will have the opportunity to raise that issue again by summary judgment motion. Given the strictures of *Hanover Shoe* and *Illinois Brick,* the district court may and should demand from the plaintiffs in each case a pretrial demonstration that they have definite and particularized proof that they will need to establish damages.

Id. at 1166-67.

Appellants here never attempted to conform their allegations to the requirements of *Hanover Shoe-Illinois Brick,* even in the face of defendants' motion for summary judgment. Despite deposition testimony taken from dozens of witnesses with both direct and indirect buying experience, appellants do not cite a single example of functional equivalence with a *pre-existing* cost-plus contract, *cf. Eastern Airlines, Inc.* v. *Atlantic Richfield Co.,* 609 F.2d 497, 499 (TECA 1979) (to be legally sufficient any functional equivalent of a cost-plus contract exception to the *Hanover Shoe* ban against defensive use of passing on must be one that is already in existence so that its impact on middlemen's

pricing decisions can be known in advance), much less *rigid and uniform adherence* to any such business arrangements, see *Beef Industries*, 600 F.2d at 1165 & n.21. Appellants do not even allege that their suppliers used the cost-plus "rules of thumb" rejected by the *Illinois Brick* Court as insufficient. *See Illinois Brick*, 431 U.S. at 744, 97 S.Ct. at 2073. In fact, nowhere do appellants describe *any* of their middlemen-suppliers' sales practices. They merely assert for the first time on appeal—without explanation or record cite—that the cost element represented by phantom freight and standard weights is "readily identifiable throughout the chain of distribution" until such time as plywood becomes a component of an erected structure.

In their brief to this court, appellants concede "the fact that a middleman may charge more or less for the plywood because of supply and demand forces" but contend that the middleman's conduct "is totally irrelevant to the issue presented by this case." We disagree. The ability to determine the impact of defendants' pricing behavior on a middleman's subsequent pricing decisions in that middleman's dealings with indirect-purchaser plaintiffs is the crux of appellants' right to maintain their action. Appellants have not alleged, much less demonstrated, their entitlement to this right.

Appellants further argue that they were under no duty to counter defendants' Rule 56 motion with appropriate summary judgment evidence, since that motion was legally insufficient. The argument appears to run as follows. After the Supreme Court handed down *Illinois Brick*, defendants moved for summry judgment on the basis of that case. Unfortunately for defendants, they merely asserted that plaintiffs were indirect purchasers and therefore were barred. Significantly, defendants never proved the absence of a genuine issue of material fact with respect to the functional equivalence of pre-existing cost-plus contract arrangements. Defendants' motion thus being legally insufficient, plaintiffs never were under any obligation to counter it.

Unfortunately for appellants, their argument merely begs the question. We see no logical reason to hold that defendants were under an obligation to prove the absence of some threshold element of plaintiffs' case, where plaintiffs never even bothered or were factually unable to put that element in issue, either through their complaints or through their resistance to defendants' motions for summary judgment. Despite the liberality of modern rules of pleading, a complaint still must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under *some* viable legal theory. *See City of Gainesville* v. *Florida Power & Light Co.*, 488 F.Supp. 1258, 1263 (S.D.Fla.1980) (citing C. Wright & A. Miller, 5 Federal Practice and Procedure § 1216, at 121-23); *cf. McClain* v. *Real Estate Board of New Orleans*, 444 U.S. 232, 242, 100 S.Ct. 502, 509, 62 L.Ed.2d 441 (1980) (to establish federal antitrust jurisdiction on ground of relationship to interstate commerce, plaintiff must allege the critical relationship in the pleadings and, if allegations are controverted, must demonstrate relationship by submission of evidence beyond the pleadings). As now-Chief Justice Burger once argued, "if a pleader cannot allege definitely and in good faith the existence of an essential element of his claim, it is difficult to see why this basic deficiency should not be exposed at the point of minimum expenditure of time and money by the parties and the court." *Daves* v. *Hawaiian Dredging Co.*, 114 F.Supp. 643, 645 (D. Hawaii 1953).

Finally, appellants argue that even if defendants' motion for summary judgment was legally sufficient, they nevertheless adequately countered the motion with respect to genuine issues of material fact. In support of this position, appellants contend in their brief to this court that before the district court they "argued that the award of summary judgment would be inappropriate, that the award of summary judgment pursuant to Rule 56 would be 'premature' and that *Illinois Brick* did not require the granting of summary judgment, even as to those plaintiffs who had bought

plywood only on an 'indirect' basis." To bolster this contention, appellants attempt to quote from their trial memorandum, to the following effect:

> In fact, the separate opposing memorandum filed by appellants in the district court expressly stated:
>
> > "the position of the plaintiffs in *American Millwork Company* case is as follows:
> >
> > 1. All such plaintiffs have concurred in the supposition [*sic*] set forth in plaintiffs' memorandum [*sic*] in opposition to defendants' motion for partial summary judgment with respect to the *Illinois Brick* decision. It is thus their position that *Illinois Brick* does not require the granting of defendants' motion, even as to those who have bought only indirectly."

Our careful scrutiny of the record, however, convinces us that this argument borders on the frivolous. In their "supplemental response opposing summary judgment," appellants made no arguments whatsoever concerning *indirect*-purchaser plaintiffs, except for the bald conclusory statement quoted above. With that exception, the memorandum is an argument for the position that *direct*-purchaser plaintiffs in the case should not suffer adverse summary judgment, despite their interrogatory responses in which they arguably characterize themselves as indirect purchasers. Attached to the memorandum are affidavits of six plaintiffs averring that they purchased plywood directly from one or more of the defendants.

The "memorandum in opposition to defendants' motion for partial summary judgment," filed by lead counsel on behalf of all plaintiffs in the multidistrict litigation and in which these appellants expressly joined (see quoted paragraph 1 above), serves appellants no better. The arguments in the litigation-wide memorandum, insofar as indirect purchasers like appellants here are concerned, are bottomed solely on efforts then extant to overturn legislatively *Illinois Brick*, and the resulting judicial inefficiency should those efforts

prove successful. The following illustration accurately subsumes all relevant arguments proffered.

> Plaintiffs specifically enumerated in Exhibit "B" hereto have not during the relevant discovery period made direct purchases of softwood plywood. Nevertheless, defendants' Motion should be denied at this time. Legislation is pending in both the U.S. Senate and the House of Representatives to overrule the holding in *Illinois Brick*. [citations]. Until such time as the form, scope and result of these legislative efforts are more clear, terminating the actions of the plaintiffs listed in Exhibit "B" hereto should be deferred.
>
> . . . .
>
> If the Court were to grant defendants' Motion now, the Court and all counsel may well find themselves faced with the task of putting the pieces back together months from now . . . The cost of judicial and legal energies and resources required by that task would be considerable.

Suffice to say that the Illinois Brick wall still stands. Appellants have yet to demonstrate, or even allege, the factual rungs of any ladder by which they legally might scale that wall. "Simple, conclusory statements alleging the existence of a factual issue are insufficient to defeat a motion for summary judgment." *Lefrak* v. *Arabina American Oil Co.*, 487 F.Supp. 808, 815 (E.D.N.Y. 1980) (granting summary judgment to indirect purchaser *even after* complaint amended to allege pre-existing cost-plus contract).

III. CONCLUSION

To summarize, we hold three things. First, in appeal No. 80-3234, we affirm the judgment of the district court in favor of defandants-appellees Georgia-Pacific, Weyerhaeuser, and Willamette on the ground that indirect-purchaser plaintiffs-appellants lacked standing under *Illinois Brick* to maintain their action against those defendants. Second, in appeals

Nos. 80-3235 and 80-3236, we affirm the judgment of the district court awarding discovery sanctions against defendants-appellants Georgia-Pacific and Willamette, respectively. Third, in appeal No. 80-3237, we affirm the judgment of the district court finding defendants-appellants Georgia-Pacific, Weyerhaeuser, and Willamette guilty of conspiracy to fix prices in violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), and awarding plaintiffs-appellees damages computed in accordance with the measure of damage as found by the jury.

AFFIRMED.

APPENDIX B

In the

United States District Court

Eastern District of Louisiana

IN RE PLYWOOD ANTITRUST LITIGATION	M.D.L. Docket No. 159
GABRIEL BUILDING SUPPLY COMPANY, et al., *Plaintiffs,* vs. **AGNEW PLYWOOD, et al.,** *Defendants.*	No. CA 72-522
SCOTT SASH DOOR AND LUMBER CO., et al., *Plaintiffs,* vs. **GEORGIA-PACIFIC CORPORATION, et al.,** *Defendants.*	NO. CA 75-224
STATE OF CONNECTICUT, et al., *Plaintiffs,* vs. **BOISE CASCADE CORPORATION, et al.,** *Defendants.*	NO. 76-2414
PLYWOOD DISTRIBUTING CO., et al., *Plaintiffs,* vs. **BOISE CASCADE CORPORATION, et. al.,** *Defendants.*	NO. 77-2215

MEMORANDUM OF OPINION

On November 14, 1978, the jury determined by special verdict that the use of "West Coast freight" and "standard

weights" in the pricing of softwood plywood from February 23, 1968, to December 31, 1973, was the result of a conspiracy among plywood manufacturers. The jury also found that these practices caused damage to plywood purchasers in the amount by which "West Coast freight" and freight calculated on the basis of "standard weights" exceeded the actual freight charges. These findings were upheld by the court in overruling defendants' post-verdict motions.

Several months later, motions were filed on behalf of three plaintiffs and one class member for summary judgment in the form of treble damages.[1] The basic issue raised by these motions—whether the amount of damages is essentially just a mathematical calculation to be made from sales and shipping records and hence is susceptible to resolution under Rule 56, or is a matter involving disputed facts and conclusions and hence is for resolution by a jury—is of great importance to the parties, affecting not only these four claims, but also the many thousands of similar claims by other plaintiffs and class members. Recognizing the serious consequences of its ruling, the court delayed its decision for many months to allow the defendants to ascertain and show what matters, if any, would be of potential relevance in the ascertainment of damages at a second trial.

Using business records of the defendants and other plywood manufacturers, the movants have tabulated with respect to their purchases of plywood in the period from February 23, 1968, to December 31, 1973, the amounts by which West Coast freight and freight calculated on the basis of standard weights

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[1] To assure that a favorable ruling on their motion would have the finality necessary to support an immediate appeal by the defendants, the movants have waived any claim to injunctive relief. *Cf. Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737 (1976). Nor, for like reason, is an award of attorneys fees sought on behalf of the four movants, *cf. Baughman* v. *Cooper-Jarrett, Inc.*, 530 F.2d 529, n.2 (CA3 1976), it being agreed however by defendants that time spent in connection with these claims may be included in subsequent claims for fees on behalf of other class members.

exceeded the actual freight charges, *i.e.* the amount of "freight pick-up" and "underweights." In a few respects the accuracy of these calculations was challenged by the defendants. By the time of the hearing on the motions for summary judgment, however, all of these mathematical disputes had been resolved by stipulation. These "single damage" claims by the movants are as follows:

	As Claimed	As Corrected
Lyman Lamb Co.	$ 49,587.37	$ 47,952.59
Plywoods Distributing Co.	104,295.40	102,813.78
Baton Rouge Lumber Co.....	226,695.41	216,448.56
City of Arkadelphia, Arkansas..	89.46	89.46

The claim of Plywoods Distributing Co., as above corrected, includes $283.63 of "underweights" respecting three orders which were placed by it prior to February 23, 1968, but were not shipped, invoiced, or paid for until after that date. The defendants assert that these damages are barred by the four year limitations period of 15 U.S.C. § 15b, suit having been filed on February 23, 1972. Surprisingly, no reported decisions directly addressing this legal issue have been cited to the court.

A fair reading of *Zenith Radio Corp.* v. *Hazeltine Research*, 401 U.S. 321 (1971), is that the damage period commences at the time "when damages become adequately provable." See II *Areeda & Turner*, ANTITRUST LAW, § 35c, p. 123; *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 517 F.2d 117 (CA 5 1975). "[A] plaintiff may recover damages occurring within the period of limitations that are the result of conduct occurring prior to that period, if at the time of the conduct, those damages were speculative, uncertain, or otherwise incapable of proof." *Akron Presform Mold Co.* v. *McNeil Corp.*, 496 F.2d 230 (CA 6 1974); also see *Monona Shores, Inc.* v. *United States Steel Corp.*, 374 F.Supp. 930 (Minn. 1973); *Northland Equities, Inc.* v. *Gateway Center Corp.*, 441 F.Supp. (E.D. Pa. 1977).

Proper application of these principles, however, in the present litigation is a matter of fair debate. One could argue that in

the circumstances of this case the fact of injury would be relatively certain and the amount of damages subject to reasonable approximation once an order for particular plywood items was placed by a purchaser for delivery to a given location. On the other hand, it could also be contended that a purchaser would not have provable damages until submitted an invoice or shipping documents from which actual freight charges could be determined.

The court concludes that in the context of this case—where the actual freight charges are critical to the determination of both the fact and amount of damages caused by the conspiracy —the cause of action respecting any given sale should be deemed to have accrued, thereby starting the running of the statute, as of the time when that order was shipped. As of the shipment date, (1) the last act of the seller needed to give rise to an obligation to pay on the part of the purchaser would have taken place, and (2) the essential matters on which the fact and amount of damages would depend—*i.e.*, actual weight, shipping origin, and mode of transportation—would have occurred. Prior to shipment, a purchaser's claim of injury and damage would be uncertain and speculative; upon shipment, however, the damage would be "provable," whether or not the purchaser would itself be in a position to do so immediately.

The three purchases by Plywoods Distributing Co. which have been challenged by defendants as time-barred were, while ordered more than four years before this litigation was instituted, shipped within that four year period. The court concludes that the claim for damages based on these purchases is not precluded by 15 U.S.C. § 15b.

Whether summary judgment should be granted depends basically upon the effect to be given to the jury's verdict that a conspiracy among plywood manufacturers caused injury in the amount of "freight pick-up" and "underweights." If this finding be used not only to determine who was injured but also to measure the amount of that injury, then, as defendants admit on page 2 of their brief, "it is a purely mechanical computation" —and, hence, summary judgment should be appropriate when,

as is true respecting the claims of the four movants, any factual disputes as to those calculations have been resolved.

Defendants' opposition to summary judgment takes the form of a lengthy brief, and affidavit from its counsel, and an affidavit from the economics professor who testified in the first trial. The major themes of the brief are that the jury in the first trial should have determined only whether—not how—the conspiratorial practices caused injury and, of course, that the jury was mistaken in the conclusions it reached concerning those injuries. These are the same points that were considered and overruled by the court when it denied defendants' post-trial motions; and nothing new has been presented to cause a change in that opinion.

The court has reread, several times, the defendants' brief and affidavits in an effort to discern what evidence they envision being presented at a second trial. The evidence suggested by them as potentially relevant on a second trial is essentially but a repetition of the very evidence that was presented and considered at the first trial—evidence that was rejected by the jury when it found, contrary to defendants' arguments, that purchasers were damaged by the use of freight pick-ups and underweights. In short, the defendants offer nothing new for presentation at another trial—they only seek a "second bite at the same apple." Indeed, the lack of new evidence to be presented at another trial belies the defendants' claim that they were prejudiced by the jury's considering how purchasers were damaged by the conspiratorial practices.

It is, therefore, the conclusion of the court that summary judgment is due to be granted to the movants against the three defendants, Georgia-Pacific Corporation, Weyerhaeuser Company, and Willamette Industries, Inc. The respective amounts of "single damages" as earlier set out, are to be tripled under 15 U.S.C. § 15 before entry of judgment.

Finally, it is appropriate to consider the effect of the settlements earlier made in this litigation with thirty other manufacturers of plywood. Allocation of the settlement funds

among plaintiffs and class members has been deferred until completion of the process of compiling voluminous purchase information for all class members, similar to that compiled for the four movants in connection with their motions for summary judgment. In due course, however, that process will be completed, and the movants will be distributed their respective shares of the settlement funds. The movants do not deny that the amounts so received by them from settlements with other manufacturers will reduce the amount they can collect from the defendants under the judgments here being entered.

The defendants have by special motion requested a ruling from the court that any judgments entered against them be subject to reduction based, however, not on the amounts received in settlement from other manufacturers, but rather in some proportional manner according to the respective liabilities of themselves and the other manufacturers. While somewhat unclear how these respective liabilities would be measured, defendants' principal argument appears to be that, as but three of thirty-three manufacturers found to have been implicated in a price-fixing conspiracy, they should pay only 3/33, or 9%, of the damages suffered by the plaintiff class. The damages so "carved out" would presumably be tripled, and judgment entered accordingly, without regard to the amounts actually recovered by the plaintiff class from other manufacturers.

Whatever its logic in other contexts, such as maritime law,[2] the approach advocated by defendants is clearly contrary to the established principle that liability under the antitrust laws is joint and several, permitting the entire damages suffered by a plaintiff to be recovered from any one or more of the co-conspirators. Indeed, the courts have thus far ruled without

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[2] See, *Cooper Stevedoring Co., Inc.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974); *Leger* v. *Drilling Well Control, Inc.*, 592 F.2d 1246 (CA5 1979); *Doyle* v. *United States*, 441 F. Supp. 701 (D.S.C. 1977). It has been applied by some courts in other areas of tort law. See *Martello* v. *Hawley*, 300 F.2d 721 (CA DC 1962); *Gomes* v. *Brodhurst*, 394 F.2d 465 (CA3 1968).

exception that the reduction for amounts received in settlement should be made *after*, not before, trebling of the gross damages. See *Flintkote Company* v. *Lysfjord*, 246 F.2d 368 (CA9 1957); *Semke* v. *Enid Automobile Dealers Ass'n.*, 320 F.Supp. 445 (W.D. Okla. 1970); *Wainwright* v. *Kraftco Corp.*, 58 F.R.D. 9 (N.D.Ga. 1973). As the Fifth Circuit has noted,

> "An antitrust action is in the nature of a tort action and defendants are jointly and severally liable, *see, e.g., Wainwright* v. *Kraftco Corp.*, 58 F.R.D. 9, 11-12 (N.D.Ga. 1973). Accordingly, the fact that the alleged actual damages caused [plaintiff] by [two alleged co-conspirators who were voluntarily dismissed] was small proportionately did not diminish their liability . . . " *Solomon* v. *Houston Corrugated Box Co., Inc.*, 526 F.2d 389, 392 n.4 (CA5 1976).

In this circuit, moreover, it has recently been held that there is no right of contribution available to an antitrust defendant against the alleged co-conspirators—a ruling that would be meaningless if the antitrust defendant were only chargeable *ab initio* with "its share of liability". See *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897 (CA5 1979).

In one respect, a percentage reduction is due to be applied in this case; and the plaintiffs do not disagree, except in the details of application. Such a reduction is to be made because of special terms in the settlement agreements made on behalf of the class members with three of the manufacturers, Champion International, International Paper, and Louisiana Pacific. In those three intances, it was agreed that any judgments later entered against other plywood manufacturers—such as the judgments now being entered—should be reduced by a percentage equal to those settling companies' percentages of total sales of softwood plywood for the period covered by such judgments. This condition was incorporated into the agreements at the insistence of the three settling companies in an effort to limit, if not avoid, their possible liability to other plywood manufacturers in the litigation which might otherwise arise under general principles of indemnification or contribution or under the terms of a

damage-sharing agreement entered at the outset of the litigation by certain of the plywood manufacturers.[3]

There are two principle points of disagreement between the parties in connection with the calculation of the correct percentage reduction figure. The first concerns the proper treatment of inter-company sales; *i.e.* plywood sold by one manufacturer to another for resale; the second is whether the sale of all plywood manufacturers should be considered, or only those of the thirty-three manufacturers who were retained as defendants in the litigation. Considering the applicable language in the settlement agreements and settlement orders, as well as the reasons why such conditions had been demanded by the three settling companies, the court concludes that the percentage reduction figure is to be calculated by using sales figures for the 1968-73 period for the thirty-three manufacturers who were claimed to be co-conspirators, the figure for each such manufacturer to include its sales of plywood purchased from other manufacturers but to exclude its sales of plywood to other manufacturers.

The court was earlier of the view that, before judgment could be entered in favor of the four movants against the three remaining defendants, it would be necessary to calculate the percentage reduction figure called for under the three special agreements. After further consideration, however, the court is persuaded that the percentage reduction is one which need not be made before determining the amount of judgment to be entered, but can rather be given effect after entry of judgment.

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[3] The companies had initially sought to limit their post-settlement exposure by language in the settlement agreements which would have excluded from further claims for damages in the litigation all purchases of plywood which had been made from those settling companies. Believing that this provision would have a disparate impact upon the various class members, the court rejected the three agreements. The judgment-reduction approach adopted in the modified agreements affected all class members in the same manner and was, after settlement hearings following notices to the class, accepted by the court as part of the settlements with these three manufacturers.

That is, the percentage reduction—like the reduction based on distribution of settlement funds from other manufacturers[4]—is available to reduce or satisfy the judgments during the period for execution. No longer under pressure to make a determination in order to assure appealability of other matters, the court declines to set the percentage reduction figure on the present state of the stipulated facts.[5]

The motions for summary judgment of the four movants are therefore granted, and judgment will be entered in their favor against the three defendants as follows:

Lyman Lamb Co.	$143,857.77
Plywoods Distributing Co.	308,441.34
Baton Rouge Lumber Co.	649,345.68
City of Arkadelphia, Arkansas	268.38

There is no just reason for delay, and accordingly the Clerk will be ordered under F.R.Civ.P. Rule 54(b) to enter such judgments as final. The defendants' motion for reduction of judgment is denied, without prejudice however to their right to obtain credit upon the judgments based upon the percentage reduction figure calculated under the Champion International, International Paper, and Louisiana Pacific agreements and upon the receipt of settlement funds from the other twenty-seven plywood manufacturers.

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[4] The reduction based on receipt of settlement funds will, of course, be limited to the portion of the settlement funds not contributed by the three manufacturers having the special clauses in their settlement agreements.

[5] It is not clear whether the 62,858,522 in thousands of square feet, on a 3/8" surface measure basis—essentially a "production" figure—is or is not agreed to constitute the sum of sales by the thirty-three companies in the 1968-73 period if sales are defined as set out in the preceding paragraph of text. If it is so stipulated, then the court would have adopted the defendants' position respecting paragraph 13 of their stipulation and the plaintiffs' position respecting paragraph 14, and would have determined the percentage reduction figure to be 25.159758%.

II.

With the entry under Rule 54(b) of judgments from which appeals can be taken, it is also now appropriate to put in appealable form two matters previously considered by the court. (1) In pretrial proceedings the court granted summary judgment in favor of defendants with respect to damage claims of plaintiffs and intervenors based on "indirect purchases." The court now reaffirms this ruling of March 30, 1978, and, finding that there is no just reason for delay, directs the Clerk to enter final judgments under Rule 54(b) with respect to such claims and parties. (2) During the trial the court granted plaintiffs' Rule 37 motion for an award of fees and expenses against Georgia-Pacific and Willamette. The court now reaffirms those rulings, denying Georgia-Pacific's motion for reconsideration, and, finding that there is no just reason for delay, directs the Clerk to enter these awards as final judgments under Rule 54(b).

This the 14th day of February, 1980.

/s/ SAM C. POINTER, JR.
United States District Judge

In the

United States District Court

Eastern District of Louisiana

IN RE: PLYWOOD ANTITRUST LITIGATION	M.D.L. Docket No. 159
GABRIEL BUILDING SUPPLY COMPANY, et al., *Plaintiffs,* vs. **AGNEW PLYWOOD, et al.,** *Defendants.*	Civil Action No. 72-522
SCOTT SASH DOOR AND LUMBER COMPANY, et al., *Plaintiffs,* vs. **GEORGIA-PACIFIC CORPORATION, et al.,** *Defendants.*	Civil Action No. 72-224

JUDGMENT

Judgment in the amount of $143,857.77 is hereby entered in favor of plaintiff Lyman Lamb Co., and against defendants Georgia-Pacific Corporation, Weyerhaeuser Company and Willamette Industries, Inc.

Approved As To Form

/s/ SAM C. POINTER, JR.
United States District Judge

Entered this the 21st day of February, 1980.

/s/ NELSON B. JONES
Nelson B. Jones, *Clerk*

In the

United States District Court

Eastern District of Louisiana

IN RE: **PLYWOOD ANTITRUST LITIGATION**	M.D.L. Docket No. 159
GABRIEL BUILDING SUPPLY COMPANY, et al., *Plaintiffs,* vs. **AGNEW PLYWOOD, et al.,** *Defendants.*	Civil Action No. 72-522
PLYWOODS DISTRIBUTING CO., et al., *Plaintiffs,* vs. **BOISE CASCADE CORPORATION, et al.,** *Defendants.*	Civil Action No. 77-2115

JUDGMENT

Judgment in the amount of $308,441.34 is hereby entered in favor of plaintiff Plywoods Distributing Co., and against defendants Georgia-Pacific Corporation, Weyerhaeuser Company and Willamette Industries, Inc.

Approved As To Form

/s/ SAM C. POINTER, JR.
United States District Judge

Entered this the 21st day of February, 1980.

/s/ NELSON B. JONES
Nelson B. Jones, *Clerk*

In the

United States District Court

Eastern District of Louisiana

IN RE: PLYWOOD ANTITRUST LITIGATION	M.D.L. Docket No. 159
GABRIEL BUILDING SUPPLY COMPANY, et al., *Plaintiffs,* vs. **AGNEW PLYWOOD, et al.,** *Defendants.*	Civil Action No. 72-522

JUDGMENT

Judgment in the amount of $649,345.68 is hereby entered in favor of plaintiff Baton Rouge Lumber Co., Inc., and against defendants Georgia-Pacific Corporation, Weyerhaeuser Company and Willamette Industries, Inc.

Approved As To Form

/s/ SAM C. POINTER, JR.
United States District Judge

Entered this 21st day of February, 1980.

/s/ NELSON B. JONES
Nelson B. Jones, *Clerk*

In the

United States District Court

Eastern District of Louisiana

IN RE: PLYWOOD ANTITRUST LITIGATION	M.D.L. Docket No. 159
GABRIEL BUILDING SUPPLY COMPANY, et al., *Plaintiffs,* vs. **AGNEW PLYWOOD, et al.,** *Defendants.*	Civil Action No. 72-522
STATE OF CONNECTICUT, et al., *Plaintiffs,* vs. **BOISE CASCADE CORPORATION, et al.,** *Defendants.*	Civil Action No. 76-2414

JUDGMENT

Judgment in the amount of $268.38 is hereby entered in favor of plaintiff City of Arkadelphia, Arkansas, and against defendants Georgia-Pacific Corporation, Weyerhaeuser Company and Willamette Industries, Inc.

Approved As To Form

/s/ SAM C. POINTER, JR.
United States District Judge

Entered this the 21st day of February, 1980.

/s/ NELSON B. JONES
Nelson B. Jones, *Clerk*

APPENDIX C

In the

United States District Court

Eastern District of Louisiana

IN RE PLYWOOD ANTITRUST LITIGATION	MDL Docket No. 159 (All Cases)

ORDER

The joint motion of defendants for judgment notwithstanding the verdict and, alternatively, for a new trial is hereby DENIED.

Under F.R.C.P. Rule 58 the clerk is hereby directed to enter judgments in the case comprising the Plywood Antitrust Litigation in the following form:

"In accordance with the special verdict of the jury returned November 14, 1978, judgment is hereby rendered that the defendants, Georgia-Pacific Corporation, Weyerhaeuser Company, and Willamette Industries were during the period from February 23, 1968, to December 31, 1973, parties to a conspiracy prohibited by 15 U.S.C. § 1 (A) with all other manufacturers of Southern pine plywood in using 'West Coast freight' in the pricing of Southern pine plywood, which conspiracy caused financial damage to the purchasers of such plywood during that period equal to the amount by which 'West Coast freight' exceeded the actual freight charge (or pick-up allowance) for such plywood and (B) with all other manufacturers of softwood plywood in using 'standard weights' in the pricing of Western fir plywood, which conspiracy caused financial damage to the purchasers of such plywood during that period equal to the amount by which freight calculated on the basis of 'standard weight' exceeded the actual freight charge for such plywood. This judgment is not a final judgment under F.R.C.P. Rule 54(b)."

This the 21st day of December, 1978.

/s/ SAM C. POINTER, JR.
United States District Judge

C-2

In the

United States District Court

Eastern District of Louisiana

IN RE PLYWOOD ANTITRUST LITIGATION	MDL Docket No. 159
	(All Cases)

MEMORANDUM OF OPINION

On November 14, 1978, the jury responded to a special verdict under F.R.C.P. Rule 49(a) with answers favorable to the plaintiffs. Within ten days, the defendants filed a joint motion under Rules 50(b) and 59 for judgment notwithstanding the verdict and, alternatively, for a new trial. A decision on this post-trial motion—and indeed on whether to schedule oral argument on it—was delayed to enable defendants to file a supporting brief. The brief was filed December 6, 1978. After review, the court concludes that, without the need for oral argument, the motion is due to be denied and judgment entered upon the special verdict.[1]

[1] Pending consideration of the motions, the court—perhaps improperly under Rule 58—did not direct entry of judgment upon the special verdict. This delay, however, causes no problems of "prematurity" of the defendants' motions because Rule 50(b) and 59 do not require that such motions be filed *after* entry of judgment. See 6A *Moore's Federal Practice*, ¶59.09[1], n.17. Actually, since this judgment—not fully resolving any of the claims for relief—would not be appealable directly or under Rule 54(b), *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737 (1976), it may well be that the present ruling of the court is not "final." See *Warner* v. *Rossignol*, 513 F.2d 678 (CA1 1975).

I. Evidence to Support Findings of Conspiracy

The defendants vigorously challenge the sufficiency of the evidence with respect to the findings of a conspiracy. The court disagrees, believing the evidence sufficient not merely to create a jury issue but also to cause it, like the jury, to find that there was a conspiracy and that the three defendants were parties to that conspiracy.[2]

A more difficult problem is presented by the challenge to the jury's findings that all other manufacturers of softwood plywood were co-conspirators, a matter which is important in determining the extent of liability of the three defendants. While evidence and stipulations were presented to tie many of these other manufacturers to the conspiracies, the jury's findings are broad enough to encompass other manufacturers whose individual practices were not the subject of particularized evidence or stipulations. However, there was evidence during the trial of a more general nature, to the effect that the challenged practices were industry-wide in scope and were employed by all manufacturers. The defendants did not choose to dispute at trial these broad assertions with evidence showing variations from the industry norm by any of these other manufacturers.[3]

The principle is well established in criminal cases that, once a conspiracy is sufficiently established, only slight

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[2] Under the standard of *United States* v. *James*, 576 F.2d 1121 (CA5 1978), the court was required during trial to make its own independent determination, under a preponderance-of-the-evidence test, as to whether the conspiracy existed. The court, considering the same evidence as was presented to the jury, concluded that the conspiracy was established and allowed evidence to be received under the "co-conspirator exception" to the hearsay rule, FRE 801(d)(2)(E). This ruling—which the court now confirms upon reconsideration—also undermines the defendants' arguments that certain evidence was erroneously received under other exceptions to the hearsay rule.

[3] The court is aware from pre-trial proceedings that there may have been one or more manufacturer who deviated from the general industry practice. These matters were not, however, introduced at the trial.

evidence is required to support a jury finding that a particular co-conspiractor is connected with it. See, *e.g.*, *United States* v. *Teal*, 583 F.2d 343 (CA5 1978); *United States* v. *Brasseaux*, 509 F.2d 157 (CA5 1973). This doctrine should hardly be less appropriate when, in a civil case, the question arises in the context not even of determining whether responsibility should be placed on a "slightly connected" co-conspirator but only of determining the extent of responsibility of a "substantially connected" co-conspirator. The court concludes that the jury's finding of industry-wide participation should be accepted.[4]

II. Challenge to Findings of Impact.

The findings as to impact are attacked by the defendants as based on insufficient evidence and as responsive to inadequate and incorrect questions from the court.

While not necessarily agreeing with the findings, the court is convinced that there was sufficient evidence for the jury to determine (1) that the conspiratorial use of "West Coast freight" had injured purchasers of Southern pine plywood in amounts equal to the excess of such freight over the actual freight charges and (2) that the conspiratorial use of "standard weights" had injured purchasers of Western fir plywood in amounts equal to the excess of freight calculated on such weights over the actual freight charges. Questions as to the credibility and persuasiveness of the evidence offered by the parties were for the jury to resolve—which it has done, albeit unsatisfactorily to the defendants.

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[4]The defendants' attack upon the jury's ability to understand the evidence and the issues is without merit. To be sure, the jury was directed by the court to reconsider a portion of its findings in which there was a minor—and understandable—inconsistency in the special verdict. The jury's response to that direction—later returning a verdict that only manufacturers of Southern pine plywood were involved in the use of "West Coast freight" but that all manufacturers of softwood plywood were involved in the use of "standard weights"—displays a keen insight into the evidence and the issues.

Emphasizing *State of Alabama* v. *Blue Bird Body Co., Inc.*, 573 F.2d 309 (CA5 1978), defendants contend that the jury should have been asked not whether the challenged practices caused financial damage to the purchasers of plywood, but whether the practices caused such damage to every class member (and individual plaintiff). In essence, they would myopically read *Blue Bird* as foreclosing recovery by any class member unless all are entitled to recover.[5]

The defendants are, to be sure, correct in their position that claimants must establish with a fair degree of certainty that they were injured as a result of statutory violations and that, under prevailing Fifth Circuit decisions, this burden must ordinarily be carried in the first stage of any bifurcated trial. See *State of Alabama* v. *Blue Bird Body Co., Inc.*, *supra*; *Response to Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307 (CA5 1976); *Shumate & Co., Inc.* v. *National Ass'n of Securities Dealers, Inc.*, 509 F.2d 147 (CA5 1975); *Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d 16 (CA5 1974). This procedure, however—with instructions against speculation and placing the burden of proof upon plaintiffs—was followed in the litigation *sub judice*—in a factual context well within the parameters recognized in *Blue Bird* as appropriate for class action treatment.

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[5] The classes in the litigation *sub judice* were composed of business and governmental agencies which had purchased softwood plywood directly from the manufacturers. One possibility in advance of trial was that the plaintiffs' evidence might show that *all* purchasers had been damaged as a result of the challenged practices, varying merely according to the quantity or the price of the purchases. Another possibility—the one which became a reality—was that the plaintiffs' evidence would show that purchasers had been damaged if and when actual freight was less than "West Coast freight" calculated on the basis of "estimated weights". In this latter situation, there could well be purchasers—and indeed class members or plaintiffs—who were so situated as not to suffer any such damages: for example, a lumber dealer in Idaho purchasing Southern pine plywood might well not have suffered any damage on that purchase.

The defendants' challenge upon the adequacy of the findings as to impact might well have merit but for the fact that the jury also responded by special verdict to define and describe that impact. The jury found that the conspiracy produced overcharges on purchases equal to the amount by which actual freight was less than "West Coast freight" calculated on the basis of "estimated weights"—leaving the litigation ripe for a second, and still manageable, trial as to calculations of the amount of damages sustained by individual plaintiffs, intervenors, and class members. The procedures followed are consistent with *Blue Bird's* teachings as to proper bifurcation of a class action antitrust case.

Having attacked as incomplete the questions as to whether plywood purchasers were damaged by the conspiratorial practices, the defendants now—somewhat incongruously—attack these follow-up questions to the jury as over-inclusive. Faced with a second trial on damages which will involve relatively simple, if numerous,[6] mathematical issues distinct and separable from those involved in the first trial, *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494, 500 (1931), the defendants argue that the court prematurely submitted to the jury damage issues which should have been reserved for a second trial. In short, having failed to persuade this jury that the challenged practices caused damage to no one, the defendants essentially seek the opportunity to renew that argument before another jury instructed that there was damage but without guidance as to what that damage was.

The type of second trial envisioned by the defendants is the kind condemned in *Blue Bird* and deliberately avoided by this court in pre-trial proceedings. Mindful of the *Leasco, Shumate* and *Terrell* cases—and, fortunately, correctly anticipating the principles of *Blue Bird*—the court in Pretrial Order No. 9 defined the issues to be considered at the first trial not in the potentially ambiguous terms of statutory violation, impact, "liability," or the like, but rather as including all issues with

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[6] While thousands of transactions may be involved, the provisions of FRE 1006 should simplify the presentation of evidence. It may well be that most, if not all, damage claims can be resolved by summary judgment after necessary discovery and data compilations have been completed.

certain specified exceptions. The exception here involved was "amount of damages sustained by individual plaintiffs, intervenors, and class members"—the very issue remaining for the future trial. That the scope of this limited severance was merely intended to avoid that part of a trial which would be concerned with details of individual purchases and purchasers is further indicated by the severance of a single issue—"ability of individual plaintiffs, intervenors, and class members to claim benefit of tolling of the statute of limitations (but not issues as to concealment by defendants, which issues shall be presented at the initial trial)."[7]

Under applicable Fifth Circuit decisions and the pretrial order of this court, it must be concluded that the jury was properly asked to determine whether, as plaintiffs claimed, the conspiracy caused injury to purchasers in the form of overcharges for freight "pick-up" and "underweights".

III. Motion for a New Trial.

The defendants have raised a number of miscellaneous matters as grounds for the granting of a new trial. The court has carefully considered each of them, which need not be repeated here, and concludes that they are without merit.

IV. Conclusion.

By separate order, the defendants' motion for judgment notwithstanding the verdict and, alternatively, for a new trial is denied and the clerk is directed to enter judgment accordingly.

This this 21st day of December, 1978

/s/ SAM C. POINTER, JR.
United States District Judge

[7] The court, without opposition from plaintiffs, found the evidence insufficient as to any fraudulent concealment by the defendants and directed a verdict on that issue in favor of the defendants.

APPENDIX D

In the

United States District Court

Eastern District of Louisiana

IN RE PLYWOOD ANTITRUST LITIGATION	MDL Docket No. 159 March 15, 1976.

MEMORANDUM OPINION AND ORDERS RE CLASS ACTION ISSUES

CASSIBRY, District Judge.

This litigation consists of seventeen antitrust actions either instituted in this district or transferred here for pretrial proceedings by the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. Section 1407. *See In re Plywood Antitrust Litigation*, 376 F.Supp. 1405 (Jud.Pan.Mult.Lit.1974). Each of the actions is brought by purchasers of softwood plywood against certain plywood manfacturers under Section 1 of the Sherman Act.

Presently before the Court are the motions of the named plaintiffs in several of these actions for the certification of various classes under the provisions of Rule 23, F.R.Civ.P. Extensive factual and legal material has been submitted by the parties and oral argument on the motions was held in New Orleans on May 22, 1975. Pursuant to Rule 23(c)(1), F.R.Civ.P., this Court is required to make the instant determinations "as soon as practicable after the commencement of an action brought as a class action." Accordingly, we proceed to examine the motions presently before us.

BACKGROUND OF THE MOTIONS

The initial motions for class action certification were generally filed by two different groups of plaintiffs. The plaintiffs'

groups were aligned according to the geographic description of the purported classes of plaintiffs and the number and nature of the defendants named in the respective actions. The two plaintiff groups differed as to both the definition of the suggested class of plaintiffs and the suggested class of defendants to be certified.

Plaintiffs in the "Major Producer Cases" sought the certification of several plaintiff classes of plywood purchasers located East of the Rocky Mountains while plaintiffs in the "Industry Wide Cases" sought the maintenance of several nationwide plaintiff classes of plywood purchasers. The denomination of these groups of actions as either "major producer" cases or "industry wide" cases results from the inclusion of the seven major plywood producers only[1] as defendants in the "major producer" cases while numerous Southern only and Western only plywood producers are named as additional defendants in the "industry wide" cases.

Following our request for supplementary briefs on certain class action issues, plaintiffs in all active actions in this litigation[2] joined in seeking the certification of certain groups of actions as class actions on behalf of five nationwide plaintiff classes, with each such group of actions to proceed against the "industry wide" defendants irrespective of whether all defendants had originally been named in a particular action. These five plaintiff classes, plaintiffs maintain, are based upon traditionally recognized commercial functions: dealer, subcontractor, general contractor, builder-owner and manufacturer. The procedural flaws in plaintiffs' proposed cross-action

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[1] The seven major plywood producers named as defendants in all actions are Boise Cascade Corporation, Champion International Corporation, Georgia-Pacific Corporation, International Paper Company, Vancouver Plywood Co., Inc., Weyerhauser Company and Williamette Industries, Inc.

[2] Plaintiffs in 75-224 *(Kit)* have filed a motion for voluntary dismissal of their action and accordingly, did not join in the agreement reached among the other plaintiffs.

inclusion of defendants will be commented on in the "manageability" portion of this opinion.

PLYWOOD HISTORY AND PRICING

Softwood plywood is produced from the timber of coniferous trees generally termed evergreens.[3] Prior to 1964, softwood plywood was made almost exclusively from Douglas Fir and other species located in the Western portion of the nation and particularly the Pacific Northwest.[4] Production facilities were consequently located predominantly in that area.

As a result of the advent of new laminating techniques permitting the increased utilization of Southern Pine in the production of softwood, plywood mills for its manufacture were established in the Southern Region of the country beginning in 1963.[5] Some manufacturers of plywood previously located only in the West opened Southern mills and timber processors in the South entered the softwood plywood field.

Typically, direct mill sales of softwood plywood are priced either on an "f.o.b. mill" or on a "delivered price" basis, with delivered prices predominating.[6] The delivered price of plywood is the total amount paid by the purchaser for the product delivered to his place of business. An f.o.b. mill price is the cost of the plywood to the purchaser at the manufacturing or distribution point with the customer arranging and paying for his own delivery.[7] Theoretically, the difference between a delivered price and an f.o.b. mill price for a particular plywood

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[3] Rinfert Boston Associates, Inc., *Prices and Production, An Economic Analysis of Softwood Lumber and Plywood, 1970-1973*, p. 1.

[4] Indeed, before then more than 99% of all softwood plywood was produced in the West. *Id.* at pp. 11-13.

[5] By 1972, the Southern mills had increased their share of the plywood market to 29%. *Id.* at p. 13.

[6] Affidavit of Roy Weinstein, Vol. I, p. 17. Annex B. to Memorandum filed on behalf of the bulk of the defendants by Kirkland & Ellis.

[7] *Id.* at p. 12.

shipment should be attributable to the freight component of the delivered price.

Segregation of the actual freight component of the delivered price may be difficult for the buyer to achieve. This results from the manner in which freight charges are billed by the manufacturer. Most plywood sold on a delivered price basis is billed as "freight prepaid." The customers' invoice for the plywood sold on this basis reflects only the final full delivered price and does not separately list the actual freight element of that price.[8] Plywood purchasers are not as interested in actually allocating the portion of the delivered price they pay to freight charges as they are to purchasing plywood at the lowest possible delivered price, whether they provide their own transportation or whether the seller does.

The plywood manufacturer-seller is, however, acutely interested in determining the actual freight charge for plywood sold on a delivered price, freight prepaid basis since it facilitates computation of his "mill net return." The manufacturers' mill net return is defined as the delivered price less actual freight cost.[9] The higher the manufacturer-seller's mill net return, the higher his potential profit.

When plywood sales originated almost exclusively from mills located in the Pacific Northwest, manufacturers could easily calculate their mill net returns on delivered priced plywood. The actual freight rate to be subtracted from the delivered price to arrive at the mill net figure was computed by determining the distance from Portland to the location which the purchaser had chosen as his delivery point and applying the appropriate freight rate for that distance accounting, of course, for the weight of the wood.[10]

Once the Southern mills came into existence and shipments of plywood originated from them, the determination of mill net

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[8] *Id.* at p. 19.

[9] *Id.* at p. 18.

[10] *See id.* at p. 21.

returns on delivered priced sales had to be made by subtracting actual freight from the various Southern points of origin rather than the traditional Pacific Northwestern location. The advent of the Southern mills, therefore, provided plywood manufacturers an opportunity, the exercise of which is in dispute, to increase their mill net returns on sales originating from those mills by failing to reduce their delivered prices to reflect the decrease in actual freight cost achieved because of the origination of the plywood at locations closer to purchasers' selected destinations.

The failure of the plywood manufacturers to reduce their delivered prices on sales originating from Southern mills to reflect savings in freight charges could additionally have increased or stabilized the price of plywood originating from Western Mills. This conclusion is supported by the following statement in the Affidavit of Roy Weinstein, an expert economist whose findings were offered by defendants:

> "Although the allegations in this regard would appear to relate primarily to sales of plywood produced in the South, Western and Southern plywood are sold into many common markets. To the extent that these products are fungible, it would be impossible to 'stabilize' the price of one without stabilizing the price of the other.[11]

Thus if, as plaintiffs maintain, defendants conspiratorially kept the delivered price of plywood originating from Southern mills artificially high, this could have the correlative effect of increasing or stabilizing prices and mill net returns on sales from Western mills.

It should be noted that the failure of all Southern plywood manufacturers to reduce their delivered prices on sales originating from Southern mills and the corresponding increase or stabilization of prices on sales from Western mills would not necessarily have resulted in a uniformity of delivered prices and mill net returns. It would only have resulted in inflated or stabilized delivered prices and mill net returns.

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[11] *Id.* at p. 27 note 16.

It may be helpful at this point to relate the foregoing exposition to the terminology used by the parties in order to arrive at an appropriate characterization of these actions. Plaintiffs maintain that the various defendant plywood manufacturers have conspiratorially adopted a single basing point system for computing their delivered prices. This allegation is merely a shorthand description for the defendants' alleged concerted maintenance of the traditional Pacific Northwest location for determining the freight component of the delivered price notwithstanding the origination of certain plywood sales from Southern mills.

Plaintiffs contend that defendants' conspiratorial failure to adjust delivered prices to reflect the actual point of origin of a particular plywood shipment has resulted in the payment of substantial unearned "phantom freight" to defendants. The use of the term "phantom freight" is another way of describing the increased mill net return to the defendant manufacturers and higher or stabilized price of plywood as a result of the alleged conspiracy.

The terms single basing point system and phantom freight are not dispositive of the nature of these actions but serve only to summarize the means and effects of the alleged illegal agreements posited by plaintiffs.

NATURE OF THE ACTIONS

Plaintiffs allege, inter alia, that the defendant plywood manufacturers have:

> "established and maintained a system of delivered prices based on computation of rail freight from the Pacific Northwest for shipment made from mills located outside that region."[12]

The gravamen of plaintiffs' Section 1, Sherman Act claims is that the adoption of the single basing point system by all

[12] *See e.g.* Par. 18, *West Deer Park* Complaint.

defendants was the result of an illegal combination and conspiracy whose purpose was to increase or stabilize prices and eliminate price competition in the manufacture, distribution and sale of softwood plywood.[13] The concerted use of the single basing point system is only the means by which the increase or stabilization of prices and mill net returns is alleged to have occurred.

Plaintiffs additionally allege that in furtherance of their conspiracy defendants have:

> "established and maintained a system of delivered prices based on computation of rail freight and applied it to shipments made by other and cheaper modes of transportation;
>
> "refused to permit customers who purchase from southern plants the option of picking up purchases at true f.o.b. mill prices;
>
> "used identical and inaccurate estimated weights as the basis for quoting delivered prices."[14]

Each of these allegations also relates to an alleged conspiratorial attempt by defendants to stabilize or increase prices and their mill net returns. The estimated weights allegation, arises from the fact that most direct mill sales of softwood plywood are negotiated prior to the actual weighing of the wood which necessitates the use of some system to convert the ordered length of plywood into the appropriate poundage. The estimated weights allegation, when dissected, is that as part of the alleged conspiracy defendants agreed to utilize identical and erroneous conversion tables.

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[13] *See e.g., id.* at Pars. 19, 20.

[14] *See e.g. id.* at Par. 20. It should be noted that the complaints in several of the industry wide cases originally included Robinson-Patman Act claims. Those claims have, at least for present purposes, been abandoned and there is no request for class certification of any Robinson-Patman Act allegations.

All of the complaint allegations mentioned above concern the alleged conspiratorial increase or stabilization of prices for plywood and defendants' mill net returns. If such a conspiracy be proved, then a violation of Section 1 of the Sherman Act will have been demonstrated. *See e.g. United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 60 S.Ct. 811, 84 L.Ed. 1129 (1940).

With the focus of the actions thus centered much of the confusion and disagreement between the parties can be avoided. Plaintiffs have argued that they are attacking a conspiracy only with the use of the single basing point system as one of the means used by that conspiracy. Defendants, on the other hand, maintained that plaintiffs were directly attacking the basing point system resulting in antagonistic interests among the members of each of the purported classes. These antagonistic interests result, according to defendants, from the fact some plywood purchasers pay only the true actual freight cost under the basing point system as posited while others pay "phantom freight".

As discussed earlier, however, the use of terms such as basing point system and phantom freight are not dispositive of the nature of these actions. When boiled down to its essential ingredient, plaintiffs allege a horizontal price fixing conspiracy among the defendants. This conspiratorial price fixing has allegedly stabilized and increased plywood prices and defendants' mill returns. Instead of focusing exclusively on the manner in which the alleged system operated to damage plaintiffs, it is our view that the inquiry should also be directed as to how the alleged system would operate to illegally benefit the defendants, if the conspiracy, as alleged, did indeed exist.

As noted earlier, by the admission of defendants' own economist,[15] it would be impossible for defendants to have increased or stabilized the price of plywood shipped from Southern mills without affecting the price of plywood shipped

[15] *See* note 11, *supra*. Weinstein Affidavit at p. 27 note 16.

from Western mills. Accordingly, if plaintiffs succeed in proving their allegations, the harmful effects of the conspiracy would not solely be to purchasers of plywood from Southern mills because of the fungibility of plywood and the many common markets into which Western and Southern plywood are sold.

That impact would not necessarily be limited to East of the Rockies purchasers who were closer to Southern than to Western mills. The injury potentially would have a nationwide effect. Thus we must reject the original plaintiffs' class limitations based on purchasers' geographic location advanced by plaintiffs in the "major producer" cases. Moreover, such a conclusion also compels us to reject defendants' contention that the fundamental nature of these actions is directed to discriminatory treatment among various plywood purchasers with only certain purchasers as possible victims of the illegal system alleged by plaintiffs. In our view, plaintiffs in the "industry wide" cases have properly alleged a price fixing conspiracy whose effect might be nationwide in scope.

Our analysis has thus far primarily concerned the sale of plywood directly from the manufacturer or his agent to the plywood customer. Each of the purported classes contains such direct purchasers. The plaintiff classes proposed, however, contain indirect plywood purchasers as well. These indirect purchasers buy their plywood from someone other than the manufacturer or his agent, such as a plywood wholesaler.

Although we are not yet called upon to decide whether indirect plywood purchasers have standing to maintain these actions against the defendants, it seems appropriate to note that each of the classes asserted appears to be comprised, at least in so far as they consist of indirect purchasers, of *final* consumers of plywood as opposed to *ultimate* consumers of plywood. *See State of Illinois* v. *Ampress Brick Company, Inc.*, 67 F.R.D. 457 (N.D.Ill.1975). Both the direct purchasers in each of the purported classes and the indirect, final consumers acquired their plywood in the same condition as originally

manufactured and sold by the defendants. Accordingly, inclusion of both direct and indirect purchasers in each of these classes is not fatal, at this time, to preclude consideration of the propriety of the maintenance of any classes so composed. It may be that on further refinement of the issues and subsequent factual development, the Court may be required to eliminate some class members in any classes certified. At this stage, however, we proceed to examine whether the requirements of Rule 23 have been met with respect to each of the proposed classes.

RULE 23 ANALYSIS

In order for an action to be maintained as a class action under Rule 23, F.R. Civ.P., each of the requirements of Rule 23(a) must be satisfied as to each of the purported classes and, in addition, one of the three conditions of Rule 23(b) must be met by all proposed classes. Although plaintiffs have attempted to hinge their requests for class certifications on Rules 23(b)(1) and (b)(2), as well as Rule 23(b)(3), the classes herein asserted can be maintained, if at all, under Rule 23(b)(3) only. *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 564 (2nd Cir. 1968); *Bogosian* v. *Gulf Oil Corp.*, 62 F.R.D. 124, 132-134 (E.D.Pa.1973); *Ungar* v. *Dunkin'Donuts of America*, 68 F.R.D. 65 (E.D.Pa.1975); 3B Moore's Federal Practice, ¶ 23.45[1] at p. 23-708 n. 43. This result follows from our conclusion that even though plaintiffs have requested equitable relief, the claims for such relief are merely incidental to the predominant focus of the actions, treble damages.

Plaintiffs have the burden of establishing that each of the requirements of Rule 23(a) and Rule 23(b)(3) have been satisfied as to each of the proposed classes. *Albertson's Inc.* v. *Amalgamated Sugar Company*, 62 F.R.D. 43, 49 (D. Utah 1973), *aff'd* F.2d 459 (10th Cir. 1974); *Philadelphia Electric Company* v. *Anaconda American Brass Co.*, 43 F.R.D. 452, 457 (E.D.Pa. 1968); *Green* v. *Wolf*, 406 F.2d 291, 298 (2nd Cir. 1968), *cert. denied* 395 U.S. 977, 89 S.Ct. 2131, 23 L.Ed.2d 766 (1969).

Before proceeding to an analysis of the propriety of the maintenance of the purported classes under Rule 23, F.R.Civ.P., it is important to delimit the permissible scope of our inquiry. In *Eisen IV, Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), the Supreme Court plainly indicated that resolution of Rule 23 motions should not involve an inquiry into the ultimate merits of an action. As the Court stated:

> "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. . . ."

417 U.S. at 177, 94 S.Ct. at 2152; *Accord Miller* v. *Mackey International,* 452 F.2d 424, 427 (5th Cir. 1971).

The District Court in *Eisen* had conducted a preliminary inquiry into the merits of the action for the purpose of determining the proper proportion of the costs of notice to absent class members to be borne by plaintiff and defendants, respectively. In sustaining the Second Circuit's reversal of that procedure, the Supreme Court did not limit its proscription of mini-hearings on the merits when they involved solely the allocation of the costs of notice. Rather, the Court stated that an evaluation of whether plaintiff or defendant is likely to prevail at the ultimate trial on the merits is an impermissible area of inquiry when resolving class action motions.

This does not mean, however, that the issues on the merits are completely irrelevant to class determinations. "An analysis of the issues and the nature or proof which will be required at trial is directly relevant to a determination of whether the matters in dispute are principally individual in nature or are susceptible to proof equally applicable to all class members. *E.g. Denver* v. *American Oil Co.,* 53 F.R.D. 620 (D.Colo. 1971)." *Abercromie* v. *Lum's Inc.,* 345 F.Supp. 387, 390 (S.D.Fla.1972); *See also Bogosian* v. *Gulf Oil, supra,* 62 F.R.D. at 131; *Albertson's Inc.* v. *Amalgamated Sugar Company, supra,* 62 F.R.D. at 48.

RULE 23(a)(1)

Rule 23(a)(1) requires a finding that "the class is so numerous that joinder of all members is impracticable." None of the defendants has disputed the numerosity of any of the purported classes nor have they argued that joinder of the absent class members would be practicable. The evidence indicates that each of the proposed classes consists of thousands of persons, the exact number being unknown at this time. The absence of figures showing the exact total number of class members in each of the classes is not fatal to a showing of numerosity under Rule 23(a)(1). *Albertson's, Inc.* v. *Amalgamated Sugar Company, supra,* 62 F.R.D. at 52. In our view, joinder of these thousands of class members in each of the proposed classes would be impracticable and accordingly, we find that the requirements of Rule 23(a)(1) have been satisfied as to each.

RULE 23(a)(2)

In order to satisfy Rule 23(a)(2), plaintiffs in each of the proposed classes must show that "there are questions of law or fact common to the class." This requirement should be distinguished from the requirement of Rule 23(b)(3) where such common questions must be shown to "predominate" over questions affecting only individual class members. The minimal requirement of commonality under Rule 23(a)(2) has been characterized as superfluous in purported Rule 23(b)(3) actions. *See* 3B Moore's Federal Practice, ¶ 23.06—1 at p. 23—301. In any event, it seems clear that common questions of fact exist with respect to all members in each of the proposed classes.

The primary common questions of fact relate to the proof which must be offered by plaintiffs in each of the proposed classes that defendants conspired to increase or stabilize the price of plywood and their mill net returns through the utilization of a single basing system, the maintenance of delivered prices based on computation of rail freight rates for shipments made by other cheaper modes of transportation, the refusal to

permit pickup from Southern mills at true f.o.b. mill prices, and the use of identical and inaccurate estimated weights as the basis for quoting delivered prices.

Since these questions are common to the members of each of the purported classes, the requirement of Rule 23(a)(2) has been satisfied as to each.

RULE 23(a)(3)

Rule 23(a)(3) requires a finding that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The typicality requirement of Rule 23(a)(3), however, closely parallels the adequacy inquiry under Rule 23(a)(4) and accordingly, will be discussed under that heading. *See, e.g. Ungar* v. *Dunkin'Donuts of America, supra.*

RULE 23(a)(4)

An action is maintainable as a class action under Rule (a)(4) if "the representative parties will fairly and adequately protect the interests of the class." The adequacy of representation requirement of Rule 23(a)(4) depends on several factors:

> "(a) The plaintiff's attorney must be qualified, experienced and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to the class."

Ungar v. *Dunkin'Donuts of America, supra*, 68 F.R.D. at p. 136; *See also Windham* v. *American Brands, Inc.*, 68 F.R.D. 641 (D.S.C.1975). In addition, the adequacy inquiry requires a finding that the representative party and his attorney can be expected to prosecute the action vigorously. *Id.*

The requirement of typicality under Rule 23(a)(3) has similarly been interpreted to mean that the claims of the representative parties cannot be antagonistic to the claims of the other class members. *See, e.g., Thomas* v. *Clarke*, 54 F.R.D. 245 (D.Minn.1971).

In their joint response to our request for supplementary briefs on certain class action issues, plaintiffs in all active actions in this litigation have designated the counsel whom they seek to have represent the various classes they propose. Although we disagree with the proposed consolidated class actions and the cross action inclusion of various defendants, we will not, nor have defendants, challenged the qualifications, experience or ability of any of the proposed class counsel. Indeed, many of the attorneys designated by plaintiffs as class counsel have been involved in some of the most significant and difficult class action litigations in recent years. We find that all such proposed counsel are sufficiently skilled to carry on this litigation. *See Dolgow* v. *Anderson*, 43 F.R.D. 472, 496 (E.D.N.Y.1968), *summary judgment rev'd*, 438 F.2d 825 (2nd Cir. 1970). And, like Judge Becker in *Dunkin'Donuts*, we believe that the possibility of recovering attorney's fees is sufficient stimulus so that the various representative parties and their attorneys can be expected to prosecute this litigation vigorously. We will make the class counsel designations in a later portion of this opinion.

Before proceeding to discuss defendants' primary arguments on the adequacy and typicality issues, it should be mentioned that defendant International Paper Company has argued that John J. O'Shea, Trustee in Bankruptcy of Diamond Lumber Co. and plaintiff in 74-1642, would be an inadequate class representative because his status as trustee precludes him from forcefully and effectively representing absent class members. *O'Shea* was brought on behalf of certain plywood purchasers located East of the Rocky Mountains. Since we will not certify any of the actions originally brought on behalf of East of the Rockies purchasers, there is no need to resolve the questions raised by International Paper's objection to O'Shea as a representative party.

The thrust of defendants' arguments on the adequacy and typicality issues is that there are inherent and irreconcilable conflicts of interest among the members of each of the proposed classes. These conflicts, according to defendants, arise from (1)

the basing point allegations; (2) the estimated weights allegations; and, (3) the presence of direct and indirect purchasers in each of the purported classes.

(1) Basing Point Allegations

Defendants argue that a basing point system must inherently involve discriminatory prices between favored and disfavored purchasers. The disfavored purchasers, defendants maintain, would be those purchasers located closer to the Southern than to the Western mills who are required to pay higher than actual freight cost for their plywood purchased on a delivered price basis. Since plaintiffs seek to end the base point pricing system, defendants contend, the conflicts between favored and disfavored purchasers preclude class treatment.

Defendants rely heavily on *Albertson's Inc.* v. *Amalgamated Sugar Company, supra,* in support of their position that conflicts between favored and disfavored purchasers precludes class designations. The defendants in that case were manufacturers of beet sugar who had established their plants in the Northwest region of the country close to the source of their raw materials. Since beet and cane sugar are fungible commodities, no sugar purchaser is willing to pay even a few pennies more for beet sugar. Realizing that they could profitably market their product only by meeting the prevailing price of cane sugar, defendants established their delivered prices by adopting the base price for cane sugar used by C & H at its plant near San Francisco plus the common carrier charges from that point. 62 F.R.D. at 47. Purchasers closer to defendants' plants than to the C & H plant would, therefore, pay higher than actual freight charges for beet sugar sold on a delivered price basis. This differential in the "prepay," Plaintiffs maintained, resulted in the accrual of unearned phantom freight to defendants. 62 F.R.D. at 48.

Plaintiffs in Albertson's seeking to represent a class of all beet sugar purchasers for resale in the complaint area, alleged four separate causes of action; First, that defendants had conspired to fix prices in violation of Section 1 of the Sherman

Act; Second, that defendants had illegally monopolized the beet sugar industry in violation of Section 2 of Sherman; Third, that defendants had utilized illegal tying arrangements in violation of Section 1 and Fourth,, that defendants had violated the Robinson-Patman Act.

The *Albertson's* court court denied class certification on the tying and Robinson-Patman Act claims. The court noted that the major issue posed by the tying claim was whether the delivered price paid by the plaintiffs was equivalent to the sale of one product, the sugar, upon condition or tied to the purchase of another service, namely, freight to the customer. 62 F.R.D. at 52. Since each and every contract for the sale of beet sugar was thereby being contested as violative of Section 1 of the Sherman Act, the court reasoned, plaintiffs in their tying claim were directly attempting to end base point pricing. The court concluded that there were differing interests among the potential class members in the continued existence of the base point pricing system which resulted in antagonistic positions within the proposed class and therefore held that the requirements of Rule 23(a)(4) had not been met. The court observed:

> "In view of the potentially varying impact on each individual sugar buyer and, consequently, their differing positions with respect to base point pricing, we feel that the named plaintiffs could not adequately represent the whole class." 62 F.R.D. at 54.

The court in Albertson's similarly denied class certification on the Robinson-Patman Act claims. It held:

> "By the Robinson-Patman count, base point pricing itself is under attack and, if the plaintiffs are successful, we would have to permanently enjoin the use of a basing point system. Again, because of the conflicting interests among the class members involved in such a ruling, those seeking to represent the class cannot do so adequately." 62 F.R.D. at 55.

In our view, defendants' reliance on *Albertson's* is misplaced in light of the essential factual differences between that case

and the actions presently before us. In *Albertson's* plaintiffs alleged that the delivered price of beet sugar to a particular purchaser would always be the same defendants allegedly agreed to charge both the C & H base price and the common carrier charges from the C & H plant to the purchaser's selected destination. Therefore, the basing point system involved in *Albertson's* allegedly determined the precise final price a beet sugar purchaser would have to pay for a particular delivered price purchase regardless of which defendant was the seller. In the event that this manner of determining uniform delivered prices was outlawed, as the court construed the requests for relief in the tying and Robinson-Patman Act claims, "some new basis price would have to be set which would maintain the percentage return on capital constant with existing levels if the defendants are to stay in business." 62 F.R.D. at 53. Regardless of the new base price which would be charged by the beet sugar manufacturers in *Albertson's*, the court concluded that termination of the system would alter competitive positions within the proposed class. *Id* Thus, it held that antagonistic interests precluded certification of the tying and Robinson-Patman Act claims.

In the instant litigation, there is no claim that the plywood manufacturer-defendants charged a uniform delivered price to a particular purchaser. The allegations relate to stabilization or increase of plywood prices and of mill returns by defendants through an illegal conspiracy. There is no contention that defendants added a uniform freight charge to a uniform base price to arrive at their delivered prices. Thus, unlike the Albertson's situation, we find no necessary alteration in competitive relationships among the members of each of the purported classes should we certify certain actions as class actions.

Moreover, even assuming such conflicts might exist were we confronted with tying and Robinson-Patman Act claims, we would nonetheless, as the court in *Albertson's* did, certify the conspiracy claims before us. The elimination of an alleged conspiratorial increase or stabilization of prices and

defendants' mill net returns is the common goal of the members of each of the purported classes since, such a conspiracy, if it exists, necessarily results in artificially manipulated prices. The fact some class members are benefitted more than others does not thereby result in antagonistic interests within each of the classes which precludes class certification. *See Jacobi* v. *Bache & Co., Inc.* 1972 Trade Cases, Par. 73,980 at p. 92,091 (S.D.N.Y.1972); *See also Windham* v. *American Brands, Inc., supra,* 68 F.R.D. 641.

(2) Estimated Weight Allegations

Plaintiffs, in substance, have alleged that defendants conspiratorially used identical and inaccurate estimated weights as the basis for quoting delivered prices. Defendants maintain that the use of estimated weights resulted in a benefit to certain purchasers when the actual weight of the wood at the time of shipment exceeded the estimated weight upon which the freight charge was determined. They argue that those purchasers who received a benefit from the use of estimated weights have conflicting interests with those purchasers who were hurt by the use of estimated weights. Thus, they contend, the inherent conflict between these different purchasers result in an antagonism of interests and destroys the requisite adequacy of representation under Rule 23(a)(4).

In our view, defendants' arguments on this point go to the merits of plaintiffs' claim that defendants conspiratorially increased or stabilized prices or their mill returns through the estimated weights device. Moreover, the benefit or detriment to particular class members as a result of the use of estimated weights goes to the amount of damages, if any, suffered by them. There is no antagonism within any of the classes with respect to proving that defendants did indeed illegally conspire to utilize erroneous estimated weight tables. Accordingly, we again reject this aspect of defendants' contentions.

(3) Direct-Indirect Purchaser Issue

Defendants contend that the presence of both direct and indirect purchasers in each of the purported classes gives rise to

conflicts of interest under Rule 23(a)(4). They argue that since only one recovery may be obtained for any one purchase, class members who buy indirectly must show that any illegal overcharge was passed on to them. Since any recovery by an indirect purchaser divests the direct purchaser to that extent from any right to recover, they maintain, the interests of direct and indirect purchasers are adverse.

Defendants rely primarily on a series of cases wherein, they contend, the presence of both direct and indirect purchasers within the same class was held to give rise to individual questions which predominated over any common questions of law or fact. *See, e. g., Ohio* v. *Richter Concrete Co.*, 69 F.R.D. 604 (S.D.Ohio 1975); *Denver* v. *American Oil Co.*, 53 F.R.D. 620 (D.Colo. 1971); *Bill Minelli Cement Contracting, Inc.* v. *Richter Concrete Corp.*, 62 F.R.D. 381 (S.D.Ohio 1973). We will, of course, reach the issue of predominance in a later portion of this opinion. Suffice it to say at this time, that none of the cases cited by defendants stand for the proposition that the presence of direct and indirect purchasers in the same class *a fortiori* results in an antagonism of interests making the representation of absent class members inadequate under Rule 23(a)(4).

The members of each of the purported classes, be they direct or indirect purchasers of plywood, all have the same interest in establishing the existence of the illegal conspiracy alleged in the complaints. Although the amount of an indirect purchaser's recovery may depend on how much of any illegal overcharge was passed on to him by the direct purchasers, *See In re Western Liquid Asphalt Cases*, 487 F.2d 191, 201 (9th Cir. 1973), both the direct and indirect purchasers have common interest in establishing facts giving rise to a right to recover any damages on either of their parts.

Thus, if any conflict between direct and indirect purchasers exists, it exists solely on the qustion of damages and not on the liability issues. Since we intend to certify the liability issues only as class issues, the presence of direct and indirect purchasers in each of the classes does not give rise to a conflict of

interest which would render the representation of absent class members inadequate.

RULE 23(b)(3)

A class action may be maintained under Rule 23(b)(3) if:

> "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual class members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

Rule 23(b)(3) lists several factors which are pertinent to the findings of predominance and superiority. They include:

> "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

(1) Predominance of Common Questions

In our discussion of the requirements of Rule 23(a)(2), we have mentioned the common questions of fact which exist among the members of each of the purported plaintiffs classes. In order to determine whether these common questions predominate, however, more is required than a mere consideration of commonality. The determination of predominance requires close consideration of the separate questions of law or fact which may determine the ultimate issues. *In re Transit Co. Tire Antitrust Litigation,* 1975 Trade Cases, Par. 60,144 at pp. 65,408; 65,418.

Defendants argue that certain individual issues overshadow any commmon questions of fact or law and hence, negate the requisite predominance. These asserted individual issues are: (A) the individual liability issues—(1) fact of injury and (2)

direct-indirect purchaser issues; (B) individual amount of damage issues; and (C) the individual fraudulent concealment issues.

(A)(1): *Individual Liability—Fact of Injury*

Defendants argue that Section 4 of the Clayton Act, 15 U.S.C. Section 15, permits monetary recovery for violation of the antitrust laws only to "any person who shall be *injured* in his business or property." (emphasis supplied). Hence, they maintain, each individual class member will have to establish the fact of his own injury before any defendant will be liable to him. Accordingly, defendants contend, this individual inquiry destroys the commonality of proof among the various class members and thus negates the required predominance.

Defendants rely heavily on *Shumate & Co., Inc.* v. *National Association of Securities Dealers, Inc.*, 509 F.2d 147 (5th. Cir. 1975). In *Shumate*, the District Court denied class certification on account of its conclusion that the controlling question as to liability was whether a class member had suffered injury thus destroying the required predominance of common factual questions. 509 F.2d at 155. Since proof of injury to business or property of each class member was critical to the determination of defendants' liability to any class member, the Court of Appeals held, the District Court was within its discretion in deciding that common questions did not predominate. *Id.*

In another portion of its opinion in *Shumate*, the Court of Appeals clarified its interpretation of the requirement of proof of the fact of injury. Proof of the fact of injury requires that plaintiff come forward with evidence of a "causal relationship" between defendants' alleged illegal activities and the resultant harm suffered by plaintiff. 509 F.2d at 153. Since Shumate had failed to introduce such evidence, the requisite fact of injury had not been established as to him individually and hence, the Court of appeals held, the District Court had been justified in entering a directed verdict against Shumate. *Id.* at 153–155.

Thus, the denial of class action status in *Shumate* was predicated on the District Court's necessary conclusion that since each class member would have to demonstrate a causal relationship between defendants' activities and the harm he suffered, common factual questions on the conspiracy issue did not predominate. Therefore, the proper inquiry is whether in the circumstances of this particular litigation proof of a causal nexus between defendants' alleged illegal conspiracy and the harm suffered by the individual class members in each class would necessitate individual factual determinations.

We conclude that such individual factual determinations would be unnecessary in the circumstances of these particular actions. Judge Blumenfeld, in *In re Master Key Antitrust Litigation*, 70 F.R.D. 23 (D.Conn.1975), recently commented on the argument that class treatment was necessarily destroyed by the requirement of proof of the fact of injury for each individual class member. He observed:

> "I believe this classic defense argument . . . to be a red herring, notwithstanding its acceptance by some courts . . . If the plaintiffs introduce proof (or if it may be stipulated) at the liabilitiy stage that they bought master key systems and that the defendants engaged in a pervasive nationwide course of action that had the effect of stabilizing prices at supracompetitive levels, the jury may conclude that the defendants' conduct caused injury to each plaintiff. The amount of that injury may be computed at a separate trial on the damage issues." 70 F.R.D., p. 26 note 3.

Thus, the causal relationship demanded by *Shumate* in order to demonstrate the fact of injury can be satisfied by a showing of sufficient relevant evidence to permit the trier of fact, at the liability stage, to *conclude* its existence without the necessity of proof by each individual class member of the immediate consequences of defendants' activities upon him. The amount of a particular class member's damages cannot, of course, be determined by such a showing but this question is properly reserved to the damage phase of the proceedings.

Applying these principles to the actions before us, if the members of each of the classes prove they purchased softwood plywood during the relevant period and that defendants conspiratorially increased or stabilized plywood prices, then the trier of fact may conclude that the requisite fact of injury occurred. Therefore, the fact of injury issues do not give rise to a host of individual questions which destroys the requisite predominance of questions common to the classes.

(A)(2): *Individual Liability—Direct-Indirect Purchaser*

Defendants argue that the presence of both direct and indirect plywood purchasers in each of the purported classes give rise to a host of individual issues which defeats the required predominance of common factual or legal questions under Rule 23(b)(3). They maintain that each of the indirect purchasers in each of the classes would have to demonstrate that any illegal overcharge was passed on to them by their direct purchaser-seller before the liability of any defendant to that particular plaintiff was established. Hence, they contend, an inquiry into these individual issues would be necessary and accordingly, that the required predominance is absent.

Defendants, in this aspect of their argument, seek to apply *Hanover Shoe, Inc.* v. *United Shoe Machinery*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), in a manner which, in our view, is totally inconsistent with its basic principles. In that case, the defendant machinery manufacturer argued that the plaintiff shoe manufacturer had passed any illegal overcharge on to its own customers, thereby sustaining no loss. The Supreme Court rejected the availability of this pass on defense, except in certain limited cost-plus circumstances, to an antitrust violator as against his direct customer. *See State of Illinois* v. *Ampress Brick Company, Inc., supra.* Defendants would have us construe the rejection of this defense by the Supreme Court as equivalent to a pronouncement that we should refuse to entertain class actions where each of the classes are composed of both direct and indirect purchasers since the indirect purchasers would have to prove the amount

of the overcharge passed on to them in order to recover damages.

The Supreme Court in *Hanover Shoe*, however, was not called upon to decide whether and to what extent indirect purchasers from an antitrust violator would be permitted to maintain actions under the antitrust laws. *See Boshes* v. *General Motors Corp.*, 59 F.R.D. 589, 595 (N.D.Ill.1973). Instead, its ruling was one aimed at fostering private antitrust actions by refusing to permit the wrongdoer to escape the consequences of his acts by arguing that the direct purchaser plaintiff had suffered no injury since he passed on an illegal overcharge.

Defendants would have us rule that the problem of allocating the recoverable damages as between direct and indirected purchasers creates so many individual issues as to negate the required predominance of common factual questions. Although such determinations may require proof of the amount of any illegal overcharge passed on to the indirect purchaser by his direct-purchaser seller, *See In re Western Liquid Asphalt Cases, supra,* these determinations relate solely to the damage phase of the proceedings and not affect the question of predominance on the liability issues. The common liability issues as between direct and indirect, final consumers in each of the proposed classes relate to the existence of the alleged conspiracy among defendants to increase or stabilize the price of plywood through the devices alleged in the complaints. In our view, these common questions predominate over any individual questions at the liability phase of the proceedings.

(B): *Asserted Individual Damage Issues*

Defendants argue that because of the prevalence of individually negotiated transactions for the purchase and sale of plywood, it would be impossible to use any formula in order to calculate the amount of damages due a member of any class and thus, that the individual inquiries necessary to make the damage determinations defeats the predominance requirement of Rule 23(b)(3).

Defendants' argument relates primarily to the manageability of these actions as class actions which, although separately discussed below, will be mentioned here. It should be noted that since we will split the liability and damage phases of these proceedings, this aspect of defendants' argument would not seem to affect the predominance of common questions on the liability issues.

Defendants rely on *Boshes* v. *General Motors Corp., supra,* for the proposition that the absence of a formula method for allocating damages among class members renders the classes unmanageable. We agree, however, with plaintiffs' rationale for the denial of class action status in *Boshes.* As they explain:

> "The Court's denial of class treatment in *Boshes* rested on two facts, neither of which are present in the case at bar. First, the sheer size of the class, some 30 or 35 million purchasers, made it unmanageable. Second, the cars sold by each division of the defendant were different:
>
> > 'Furthermore, each brand of GM automobiles offers a number of models, each available with a wide range of optional equipment.'
>
> 59 F.R.D. at 600. In the case *sub judice,* on the other hand, each defendant sells the same fungible product.
>
> "The defendants' characterization of the basis for the denial of class in *Boshes* is directly contradicted by one of the very cases upon which the defendants rely. The defendants give their interpretation of the grounds for denial as follows:
>
> > 'The reasoning is simply that the existence and amount of any pass-on depends upon the outcome of the individual negotiations and hence individual issues are created that transcend any common issues.'
>
> Def. Annex C, p. 21. This interpretation of *Boshes'* denial of class is directly refuted in *Bill Minelli Cement Contracting, Inc.* v. *Richter Concrete Corp.,* 62 F.R.D. 381 (S.D.Ohio 1973) one of the cases on which the defendant

relies. The *Minelli* court observed that the class in *Boshes* was denied certification because of its enormous size:

> In *Boshes* v. *General Motors*, supra, plaintiff sought damages against GM for an alleged conspiracy to monopolize and fix prices on passenger automobiles and a proposed class to consist of all purchasers of GM automobiles from 1965 until certification was *rejected on the grounds of unmanageability.'* (Emphasis added).

62 F.R.D. at 388." Reply of Plaintiffs in Major Producer Cases, p. 25 fn.

Thus, in our view, *Boshes* is not directly relevant to the position advanced by defendants.

Accordingly, we reject defendants' proffered argument that the prevalence of individually negotiated transactions for the purchase and sale of plywood negates the requisite predominance of common questions under Rule 23(b)(3).

(C) *Asserted Individual Fraudulent Concealment Issues*

Defendants suggest that there is a set of individual factual questions which arise from the allegations that defendants fraudulently concealed their illegal activities thus tolling the statute of limitations. Defendants argue that they will be prepared to cross-examine each and every class member to show that he has been aware for years of the existence of the practices of which the named plaintiffs complain, and hence that the class members cannot benefit from the fraudulent concealment doctrine to lengthen the period of limitations and the availability of the damage remedy.

We note, once again, that this aspect of defendants' argument relates to the predominance of common questions at the damage phase of the proceedings rather than the liability phase which is to be certified on class wide bases. The individual aspects of the statute of limitations defense can be adjudicated in the same fashion and at the same time as the

individual damage issues. Such a method was recently approved in *Ungar* v. *Dunkin' Donuts of America, supra,* wherein the court stated:

> We agree with Professor Moore who has likened the statute of limitations problem to the damage problem, and has pointed out that in private treble damage actions brought under Rule 23(b)(3), courts have 'routinely' made provisions for separate trials or determinations of damages 'in which individual claims and *defenses on statutes of limitations,* reliance, knowledge, etc., can be adjudicated.'" 3B *Moore, supra,* 23.45(1), at 27–703, n. 13. "Accordingly, we conclude that class action determination is not undermined on predominance grounds by problems that some plaintiffs may have with the statute of limitations. Those problems can be determined in due course in the separate trials on damages, should the case reach that stage." 68 F.R.D. at p. 140.

Moreover, it is not at all clear that the fraudulent concealment issues are necessarily individual rather than class wide. In *State of Minnesota* v. *United States Steel Corp.,* 44 F.R.D. 559 (D.Minn.1969), the court dissected the fraudulent concealment issue, holding that fraudulent concealment required proof of two elements: use of fraudulent means and successful concealment. "Certainly proof of the first element, if not also the second, is typical of the claims of the various members of the classes." (44 F.R.D. at 567 note 12.).

We agree with plaintiffs that in this litigation the fraudulent concealment issues appear to be generally common to all members in each of the classes. The issue is not whether plaintiffs knew of the existence of any basing point system or of the use of estimated weights but, rather, whether the named plaintiffs and the members of each of the classes knew of the alleged conspiracy among the defendant manufacturers. Thus, the crucial common questions on the fraudulent concealment issues will relate to whether defendants successfully concealed the existence of the alleged conspiracy which proof will be common among the class members in each class.

(2) Superiority Of Class Actions

In our view, the maintenance of the five nationwide classes of plywood purchasers defined below is superior to other available methods for the fair and efficient adjudication of the controversy. There is only one practical alternative to class action designations and that is that each of the actions proceed independently on behalf of the plaintiffs named therein and others who may intervene under the provisions of Rule 24, F.R.Civ.P.

The commonality of the issues of liability, the economic necessity for class actions as well as the total savings of judicial time and expense are factors which persuade us to conclude that the class action device is appropriate for this litigation. The class action device will allow a uniform and universally binding determination of the common questions of law and fact raised by the complaints in these actions.

Plaintiffs in all active actions in this litigation have requested that we designate certain groups of actions as class actions. Although we will modify this request, it is nonetheless clear that, at least insofar as the named plaintiffs are concerned, they have relinquished their interest in individually controlling the prosecution of their separate actions. Any class member who desires to control his own proceeding may, by the opt out device, institute a separate action and, therefore, is not necessarily relinquishing control of this claim by the class action device. Accordingly, the Rule 23(b)(3)(A) factor augurs favorably for class action treatment.

Because of the transfer of all actions to this Court for pretrial proceedings under 28 U.S.C. Section 1407, all of the actions commenced by the members of any of the proposed classes are already before us. Thus, the factors listed in Rule 23(b)(3)(B) and 23(b)(3)(C) need no further exposition. Indeed, the Judicial Panel recognized that the conflicting class allegations in the complaints was a basic reason for centralizing of all actions in this district.

MANAGEABILITY

Although not listed as a separate and independently required determination, the issue of the manageability of these actions as class actions deserves special attention.

(1) *Class Designations*

Plaintiffs have jointly requested that we designate certain groups of actions as class actions to proceed against all defendants regardless of whether all defendants had originally been named in each of those actions. Suffice it to say that the procedural defects inherent in such a proposed cross action inclusion of defendants, *See In re Transit Co., Tire Antitrust Litigation*, 1975 Trade Cases, Par. 60,144 at pp. 65,409–65,410, would, in our view, render the litigation unmanageable as class litigation.

We, therefore, conclude that only one action on behalf of each of the nationwide plaintiff classes should be certified as class actions with all other actions to remain dormant at least during the discovery phase of the proceedings. Since the "industry wide" cases contain the broadest array of defendants, it is our view that the expeditious resolution of this litigation can be achieved by certifying one of them to proceed on behalf of each of the classes plaintiff therein asserted.

The plaintiff classes which are hereby certified on the liability issues are defined as follows:

> ***Class I—Dealer Class:*** All private persons or business entities (with the exception of the members of the other classes herein certified and softwood plywood brokers, office wholesalers and other persons acting for or on behalf of softwood plywood manufacturers) who, since January 1, 1963, have purchased softwood from the manufacturers thereof, directly or through brokers, office wholesalers, or other persons acting for or on behalf of the manufacturers thereof.

Class II—Subcontractor Class: All private persons and business entities who as specialty contractors or subcontractors purchased softwood plywood since January 1, 1963, and used the softwood plywood in the construction of any structure of any kind or character, or any part thereof, built for the account of others.

Class III—Contractor Class: All private persons and business entities who since January 1, 1963 as general building contractors built or caused to be built for the account of others any structure or part thereof of any kind or character involving the use of softwood plywood.

Class IV—Builder-Owner Class: All private persons and business entities who since January 1, 1963 built or caused to be built for their own account, whether for their own use, rental or sale, any structure of any kind or character involving the use of softwood plywood.

Class V—Manufacturer Class: All private persons and business entities who since January 1, 1963 regularly, in the course of their business, manufactured any product for resale, which product utilized softwood plywood as a component, consisting of two subclasses:

(A) Those who purchased softwood plywood in truckload or carload quantities; and

(b) All other such manufacturers.

Each of the classes set forth above shall be defined territorially as all private persons and business entities throughout the United States and its territories. There shall be excluded from each and every of the foregoing classes any business entity which is owned or controlled by any defendant in these actions.

Each of the foregoing plaintiff classes shall be maintained against the following categories of defendants which shall consist of:

(a) Georgia Pacific Corporation, Champion International Corporation, Weyerhaeuser Company, Vancouver Plywood Company, Williamette Industries, Inc. Boise

Cascade Corporation, International Paper Company, being the defendants denominated as the "major defendants".

(b) Louisiana-Pacific Corporation, Tremont Lumber Company, Kirby Lumber Corporation, Olinkraft, Inc., Anthony Forest Products Company, Skotch Plywood Company, Owens-Illinois, Inc., Arkla Chemical Corporation, Temple Industries, Inc., Union Camp Corp., Dixon Plywood Company, Louisiana Plywood Coprporation, Vanply, Inc., MacMillan Bloedel, Inc., being the defendants denominated as the "southern pine producers."

(c) American Can Company, Columbia Plywood Corporation, Fibreboard Corporation, The Pacific Lumber Company, Pope & Talbot, Inc., Potlatch Corporation and its subsidiary, St. Maries Plywood Company, St. Regis Paper Company, Simpson Timber Company, Bohemia Inc., Medford Corporation, included its division, Sil Ply Products, and its former subsidiary, Southern Oregon Plywood, In., Evans-Products Company, including its former wholly-owned subsidiary, Van-Evan Company, Plum Creek Lumber Company, being the defendants denominated as the "western only producers."

The following actions are hereby certified as class actions to proceed on behalf of the classes designated therein, as modified and defined above, and against the defendants previously specified:

Class I—Dealer Class *Gabriel Building Supply Company, Inc., et al.* v. *Agnew Plywood, et al.*, C.A. 72–522.

Class II—Subcontractor Class *Altman Bros. Inc. of Massachusetts, et al.* v. *Georgia-Pacific Corporation, et al.*, C.A. 73–2860.

Class III—Contractor Class *James I. Barnes Construction Company, et al.* v. *Georgia-Pacific Corporation, et al.*, C.A. 73–2861.

Class IV—Builder-Owner Class *West Deer Park Associates, et al.* v. *Georgia-Pacific Corporation, et al.*, C.A. 73–2671.

Class V—Manufacturer Class *Robert Schubel, d/b/a Cabinet Crafts, et al.* v. *Georgia-Pacific, et al.*, C.A. 73–3345.

The designation of the counsel who are to represent each of the classes is complicated by our refusal to accept plaintiffs' proposal for the certification of groups of actions. Since we have determined that the proper actions to be certified are the "industry wide" cases, it seems reasonable to designate as Chief Counsel for each of the classes, the attorneys representing the named plaintiffs in the certified actions. The attorneys whom plaintiffs previously agreed would represent each of the classes shall constitute a Committee of Counsel for class (designate class) for each of the classes under the chairmanship of the Chief Counsel for each class. Plaintiffs' counsel in all of the actions in this litigation shall constitute a Committee of Counsel in All Actions under the chairmanship of Lead Counsel heretofore designated by Order filed December 19, 1974.

The following attorneys and/or their firms are hereby designated as Chief Counsel and/or members of the Committee of Counsel for each of the certified classes:

Class I—Dealer Class Garon, Brener & McNeely (Chief Counsel); Wolf, Block, Schorr & Solis-Cohen; Farella, Braun & Martel—Members of Committee of Counsel.

Class II—Subcontractor Class Mesirov, Gelman, Jaffe & Creamer (Chief Counsel)

Class III—Subcontractor Class Sommer, Tinkham, Barnard, Freiberger & Scopelitis (Chief Counsel)

Class IV—Builder-Owner Class Dansansky, Dickey, Tydings, Quint & Gordon; Seymour & Patton—Co-Chief Counsel

David Berger, P.A.; Torshen, Fortes & Eiger, Ltd.—Members of Committee of Counsel

Class V—Manufacturer Class Kramer & Salus (Chief Counsel); Harold E. Kohn, P.A. (Member of Committee of Counsel)

(2) *Conduct of the Proceedings*

Although we have certified several of the "industry wide" cases to proceed as class actions and have ordered that all other actions remain dormant at least during the discovery phase of the proceedings, the segregations of defendants into three separate groups allows us to further limit any manageability problems at this point in the proceedings.

We have indicated that the class actions which we have certified shall be maintained against three categories of defendants: major defendants, southern pine producers and western only producers. The certified actions, therefore, include the broadest array of defendants named in any of the complaints in the litigation. In order to insure that the efforts of the parties and court be directed to resolving the most significant aspect of the litigation at the outset, however, we hereby order that all further proceedings against the southern pine and western only producers be stayed until further order of the court. This "backburner" approach will allow the maximum utilization of the resources available to plaintiffs, without prejudicing their case against any of the smaller defendants. The major defendants, similarly, will not be prejudiced by this backburner approach since it will allow them to focus directly on plaintiffs allegations without becoming intertwined in the procedural and substantive problems surely to be encountered were the actions to proceed against all defendants simultaneously.

(3) General Considerations

The certifications and orders we have made above greatly reduce any difficulties which may be encountered in the management of this litigation as class litigation. The size of the classes, although large, are not of such magnitude that would render impossible the task of notifying class members. From the records already established in the *Gypsum* litigation and

supplementary information available through the major defendants, plaintiffs can, in our view, devise a feasible system for notifying the members of each of the classes of the pendency of this litigation. Plaintiffs have indicated their desire and ability to bear the costs of notice to all such class members and, therefore, we foresee none of the notice problems which plagued the plaintiff in *Eisen*.

With respect to notice to class members, Lead Counsel for plaintiffs together with the Committees of Counsel established for each of the classes shall submit to the Court within 30 days of the date of this order and serve upon counsel for the defendants their proposal for the form and method of giving notice to the class members. Defendants shall have 30 days to reply, to file such response as they deem appropriate with the Court and shall serve copies of the same upon lead counsel for plaintiffs and counsel for the classes above designated.

Although this litigation is complex and the problems to be encountered difficult, the management of this litigation is possible given the cooperation of all counsel.

APPENDIX E

Before the

Judicial Panel on Multidistrict Litigation

IN RE
PLYWOOD ANTITRUST
LITIGATION

Docket No. 159

June 10, 1974.

Before ALFRED P. MURRAH[1], Chairman, and JOHN MINOR WISDOM, EDWARD WEINFELD, EDWIN A. ROBSON, WILLIAM H. BECKER, JOSEPH S. LORD, III, and STANLEY A. WEIGEL, Judges of the Panel.

OPINION AND ORDER

PER CURIAM.

This litigation involves an alleged conspiracy within the plywood industry to fix the price of softwood plywood. Plaintiffs in each of the eight actions before the Panel are purchasers of softwood plywood and they charge the defendant plywood producers with violations of federal antitrust laws. All actions contain Rule 23 allegations purporting to represent large classes of direct and indirect purchasers of softwood plywood. Several defendant producers move the Panel for an order transferring all the actions to the Eastern District of Louisiana for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. The only opposition to the motion comes from plaintiffs in the actions pending in districts other than the Eastern District of Louisiana. On the basis of the briefs submitted and the hearing held, we find that these actions

[1] Although Judge Murrah was not present at the hearing, he has, with the consent of all parties, participated in this decision.

involve common questions of fact and that transfer of these actions to the Eastern District of Louisiana will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation.

The plaintiffs opposing transfer contend that the allegations in the Louisiana actions are much broader than those contained in their actions because only Louisiana plaintiffs allege violations of the Robinson-Patman Act in addition to violations of Section 1 of the Sherman Act, which permeate all of the actions. And they argue that in order to demonstrate Robinson-Patman Act violations, the Louisiana plaintiffs necessarily named a multitude of local defendants and, as a result, will be seeking discovery which is largely irrelevant to the other actions in this litigation.

The opponents to transfer also contend that because of the Robinson-Patman claims, complicated issues relating to plaintiffs' Rule 23 class allegations are involved in the Louisiana actions but do not exist in any of the other actions. Consequently, they see no reason for transferring their actions to Louisiana where they will become embroiled in class action matters in which they have little or no interest.

These arguments are not sufficient. All the actions contain allegations of violations of Section 1 of the Sherman Act stemming from alleged "phantom freight" charges for softwood plywood produced in the South which supposedly raised prices artificially to the level charged for plywood produced in the Pacific Northwest. And although plaintiffs' overall legal stratagems differ somewhat, they all rest on a common nexus of facts. Thus, transfer of the actions to a single district will prevent the possibility of duplicative discovery concerning defendants' alleged misconduct. And our decision in no way limits or impedes Louisiana plaintiffs' desire to pursue their Robinson-Patman Act claims or threatens to protract the litigation involving alleged violations of Section 1 of the Sherman Act. It, of course, is the responsibility of the transferee judge to determine whether and to what extent the pretrial proceedings involving the Robinson-Patman and

Sherman Act claims should be coordinated or consolidated. *See, e.g.*, In re Equity Funding Corporation of America Securities Litigation, 375 F.Supp. 1378, 1384 (Jud.Pan.Mult.Lit., filed February 1, 1974).

Furthermore, the class allegations in those actions are clearly overlapping. A Section 1407 transfer of all actions in this litigation to a single district and assignment of those actions to one judge will eliminate any possibility of inconsistent class determinations by the various district courts involved and assure the swift resolution of the difficult Rule 23 issues adverted to by the parties opposing transfer. *See* Manual for Complex Litigation, Part I, Section 5.40 (rev. ed. 1973). *See also* In re Plumbing Fixture Cases, 298 F.Supp 484, 493 (Jud.Pan.Mult.Lit.1968).

The Eastern District of Louisiana is the most appropriate transferree district for this litigation. The majority of the parties favor that district and it appears that many of the potential witnesses and documents relevant to the issues raised are located in the South. Moreover, discovery in the Louisiana actions has already commenced before the Honorable Lansing L. Mitchell and he is totally familiar with all of the issues involved in this litigation.

It is therefore ordered that all actions listed on the attached Schedule A pending in districts other than the Eastern District of Louisiana be, and the same hereby are, transferred to the Eastern District of Louisiana and, with the consent of that court, assigned to the Honorable Lansing L. Mitchell for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 with the actions pending in that district and listed on Schedule A.

SCHEDULE A

Eastern District of Arkansas

C & M Construction Co. v. Boise Cascade, et al.	Civil Action No. 74–C–32

Eastern District of New York

Park Lane Associates, et al. v. Boise Cascade Corp., et al.	Civil Action No. 73 C 1717

Eastern District of Pennsylvania

John J. O'Shea, Trustee in Bankruptcy of Diamond Lumber Co., Inc., etc. v. Boise Cascade Corp., et al.	Civil Action No. 73–2141

Eastern District of Louisiana

Robert Schubel, et al. v. Georgia-Pacific Corp., et al.	Civil Action No. 73–3345 (Section A)
Gabriel Building Supply Co., Inc. v. Agnew Plywood, et al.	Civil Action No. 72–522
West Deer Park Associates, et al. v. Georgia-Pacific Corp., et al.	Civil Action No. 73–2671
Altman Bros., Inc. of Massachusetts, et al. v. Georgia-Pacific Corp.	Civil Action No. 73–2860 (Section H)
James I. Barnes Construction Co., et al. v. Georgia-Pacific Corp., et al.	Civil Action No. 73–2861 (Section C)

APPENDIX F

In the

United States Court of Appeals

For the Fifth Circuit

No. 80-3237

IN RE
PLYWOOD ANTITRUST
LITIGATION

GEORGIA-PACIFIC CORPORATION,
Defendant-Appellant,
vs.
KOHN, SAVETT, MARION & GRAF,
P. C., et al, Movants-Appellees.
WILLAMETTE INDUSTRIES, INC.
Defendant-Appellant,
vs.
KOHN, SAVETT, MARION & GRAF,
P. C., et al, Movants-Appellees.
LYMAN LAMB CO., *et al,*
Plaintiffs-Appellees,
vs.
GEORGIA-PACIFIC CORPORATION,
et al, Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana.
M.D.L. Docket No. 159

Before
Ingraham, Politz and Williams, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that defendants-appellants pay to movants-appellees and plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

September 8, 1981

ISSUED AS MANDATE:

APPENDIX G

In the

United States Court of Appeals

For the Fifth Circuit
*Unit A**

No. 80-3237

IN RE:
PLYWOOD ANTITRUST LITIGATION,
LYMAN LAMB CO., PLYWOOD DISTRIBUTING CO.,
BATON ROUGE LUMBER CO., INC.,
and CITY OF ARKADELPHIA, ARKANSAS, et al.,
Plaintiffs-Appellees,
v.
GEORGIA-PACIFIC CORP.,
WEYERHAEUSER COMPANY, and
WILLAMETTE INDUSTRIES, INC.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before
Ingraham, Politz and Williams,
Circuit Judges.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion 9-8-81, 5 Cir., 1981, F.2d).
(NOVEMBER 3, 1981)

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452, October 14, 1980.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

Entered for the Court:

/s/ HENRY A. POLITZ
United States Circuit Judge

APPENDIX H

In the

Supreme Court of the United States

GEORGIA-PACIFIC CORPORATION, et al., Petitioners v. LYMAN LAMB COMPANY, et al.	No. A-636

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 3, 1982.

/s/ BYRON R. WHITE
Associate Justice of the Supreme Court of the United States

Dated this 18th day of January, 1982.

APPENDIX J

In the

United States Court of Appeals

For the Ninth Circuit

Nos. 78-1757, 78-1764

BOISE CASCADE CORPORATION, Champion International Corp., Georgia-Pacific Corp., Weyerhaeuser Co., and Willamette Industries, Inc.,

Petitioners,

vs.

FEDERAL TRADE COMMISSION

Respondent.

May 9, 1980.

Before
Wallace and Kennedy
Circuit Judges,
and **Bartels,***
District Judge.

Wallace, Circuit Judge:

Petitioners in these consolidated actions seek reversal of a Federal Trade Commission (Commission) order finding that each violated section 5 of the Federal Trade Commission Act (FTCA), 15 U.S.C. § 45, by adopting and maintaining a system of delivered pricing which utilized the computation of rail freight charges from the Pacific Northwest in determining the price of southern plywood. *Boise Cascade Corp.*, 91 F.T.C. 1 (1978). We decline to enforce the order.

I.

Petitioners are manufacturers of softwood plywood with mills located in the southern part of the United States. Until 1947 all plywood was manufactured from Douglas Fir and

* Honorable John R. Bartels, United States District Judge, Eastern District of New York, sitting by designation.

was produced in the states of Washington and Oregon. By 1963, technological advances had made possible the fabrication of plywood from various species of southern pine, leading to the development of the southern plywood industry. By 1974 the South produced 32.3 percent of all plywood marketed in the United States and 45.7 percent of plywood sheathing, the subject of this controversy. Petitioners accounted for more than 50 percent of southern production of plywood sheathing.

Because the product is considered to be fungible, price is the main factor of competition in the marketing of southern plywood sheathing. Prior to the development of the southern plywood industry, West Coast plywood manufacturers typically quoted a "delivered price," which consisted of a "mill price" plus the amount for rail freight from the West Coast (West Coast freight). This freight factor was computed by reference to concentric bands or freight zones running from north to south and radiating eastward from a Portland, Oregon zone. Although the rate for shipping plywood increases as a shipment enters new freight zones going east, freight rates are identical within any given zone.

The southern plywood industry has from its inception used West Coast freight in calculating and quoting prices to buyers across the country. The parties agree that this practice was a natural development and reflected the fact that in the early years of southern production, western mills remained the dominant supplier of plywood even in the South. Since southern plywood was widely viewed as inferior in quality to western plywood, it was necessary to sell southern plywood at a slightly lower price. The use of West Coast freight made possible ready comparison between western and southern plywood prices,[1] encouraged expansion of

[1] The use of West Coast freight enabled buyers to compare western and southern plywood prices by reference to a single mill or index price, knowing that the precise difference would be reflected in a total delivered price. Without West Coast freight, comparison would also have been more cumbersome because southern freight rates are point-

southern mills, and probably prevented southern prices from dropping so low as to create a disincentive to ship western plywood into the South at a time when southern mills lacked the capacity to meet southern needs.

The Commission found, however, that these original justifications dissipated as the southern plywood industry developed to the point where southern and western plywood no longer competed in the South. It concluded that the industry-wide practice of continuing to utilize West Coast freight has had the tendency and effect of inhibiting competition over the freight factor in the price of southern plywood. On the other hand, petitioners contend that use of the West Coast freight factor is merely a matter of form that has no effect on price in the "highly competitive" plywood industry, and that West Coast freight is justified as a convenience to buyers when comparing the price of plywood in regions where there is western and southern plywood competition.[2]

II.

The hallmark of challenged delivered pricing systems has been the industry-wide use of an artificial freight factor as a "freight equalizer." Since in many industries freight is one of the important variables in the price-setting process, there is a natural tendency toward price cutting based on locational advantages, especially when production capacity exceeds demand. One way of eliminating such price competition is to create a pricing system that eliminates freight

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to-point rather than zone rates and vary according to the weight of the load. Ironically, the greater ease with which price quotations are compared when based on West Coast freight is the basis not only of petitioners' business justification for the practice, but also of the Commission's conclusion that it serves as an influence to eliminate potential bargaining and thereby reduces price competition.

[2] When this opinion makes reference to the use of West Coast freight, there is no intention to answer thereby the critical question whether its use involves the adding of an anticompetitive premium or merely one way of stating a competitive delivered price.

differentials as a bargaining subject. *See* Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv.L.Rev. 655-75 (1962) [hereinafter cited as *Agreement under the Sherman Act*]; Adelman, *Effective Competition and the Antitrust Laws*, 61 Harv.L.Rev. 1289, 1327-47 (1948); Comment, *Price Systems and Competition: The Basing-Point Issues*, 58 Yale L.J. 426, 430-34 (1949) [hereinafter cited as *The Basing-Point Issues*]. Typical of such systems are so-called basing-point pricing systems,[3] in which one or more locations are established as centers for the computing of a delivered price. A non-basing point producer calculates his freight charge as though his plant were located at the basing point, either "absorbing" or gaining the difference between his basing-point freight charge and the actual freight charge. While various differences in operation might be described, "the multiple and single [basing-point pricing] systems function in the same general manner and produce the same consequences—identity of prices and diversity of net returns." *FTC* v. *Cement Institute*, 333 U.S. 683, 699, 68 S.Ct. 793, 802, 92 L.Ed. 1010 (1948).

Petitioners' West Coast freight is not a true basing-point pricing system.[4] Nevertheless, being a delivered pricing system, it has the same potential to stabilize prices as basing-

[3] For a general description of the distinctive feature of single and multiple basing-point pricing systems, see *FTC* v. *Cement Institute*, 333 U.S. 683, 696-700, 68 S.Ct. 793, 801-803, 92 L.Ed. 1010 (1948).

[4] One is tempted to describe the challenged pricing system here as a "single basing-point" system. Certainly the West Coast serves as a "basing point" for southern mills in that West Coast freight is used to calculate a delivered price; but the classic example of single basing-point pricing is the "Pittsburgh Plus" system utilized in the Steel industry, which rigidly required all sellers to use not only the rail freight charge from Pittsburgh to the point of delivery, but also "the Pittsburgh base price." See *FTC* v. *Cement Institute, supra*, 333 U.S. at 697-98, 68 S.Ct. at 801-802. Petitioners here contend that varying index prices in the southern plywood industry rebut any inference that this pricing system operates in the classic fashion.

point systems. When combined with the standardization of delivery methods, service extras, and discounts, any delivered pricing system can become a potent tool for assuring that competitors are able to match prices and avoid the rigors of price competition. The Commission typically has challenged delivered pricing systems under a theory of conspiracy to eliminate price competition by adherence to a formula which has the effect of making their prices identical. Frequently the finding of concerted action has been based on direct evidence of explicit agreement, *e.g., American Chain & Cable Co.* v. *FTC*, 139 F.2d 622 (4th Cir. 1944), or, as in the *Cement Institute* case, on circumstantial evidence of "collective methods" used to assure compliance with the pricing formula—including boycotts, discharge of employees, retaliatory price-cutting against recalcitrants, and preparation and distribution of freight rate books. *Cement Institute* v. *FTC, supra*, 333 U.S. at 710, 68 S.Ct. at 807. In addition, reviewing courts and the commission have relied in varying degrees on the inferences to be drawn from identical prices, particularly when independent evidence suggests that the identities are unusually rigid and that the price structure as a whole is unusually stable (as when demand is falling). *See Bond Crown & Cork Co.* v. *FTC*, 176 F.2d 974, 978-79 (4th Cir. 1949) (price identity and rigidity); *Cement Institute* v. *FTC, supra*, 333 U.S. at 715-16, 68 S.Ct. at 810-811 (uniform pricing); *Triangle Conduit & Cable Co.* v. *FTC*, 168 F.2d 175, 180 (7th Cir. 1948), *aff'd by an equally divided Supreme Court sub nom., Clayton Mark & Co.* v. *FTC*, 336 U.S. 956, 69 S.Ct. 888, 93 L.Ed. 1110 (1949) (matching prices and inability of local buyers to obtain better prices); *United States Maltsters Ass'n* v. *FTC*, 152 F.2d 161, 164 (7th Cir. 1945) (identical prices).

The tension in the law of delivered pricing stems from the fact that, notwithstanding their potential for abuse as a price-fixing device, Congress has repeatedly refused to require the exclusive use of f.o.b. pricing or to prohibit freight equalization. *Cement Institute* v. *FTC, supra*, 333 U.S. at 737-38 & n.11, 68 S.Ct. at 821-22 (Burton, J., dissenting).

Thus, there appears to be little doubt that the independent decision of an individual seller to absorb freight in order to match a distant competitor's price is legal under the antitrust laws. Federal Trade Commission, Notice to the Staff: In re: Commission Policy Toward Geographic Pricing Practices, Oct. 12, 1948, at 3 [hereinafter cited as Commission Policy Statement].

A more doubtful issue concerns the legal status of the industry-wide use of an artificial freight factor under circumstances which provide no ready evidence of any actual collusion. At least as of 1948, the Commission adopted the view that the "conscious parallelism" involved in the industry-wide adoption of a basing-point pricing system, although lacking the traditional ingredients of Sherman Act conspiracy, may constitute grounds for proceeding under section 5. *Id.* Indeed, the Commission utilized the conscious parallelism theory in Count Two of its complaint in *Triangle Conduit & Cable Co.* v. *FTC, supra*, 168 F.2d 175. In *Triangle Conduit*, the Seventh Circuit sustained a conspiracy count as well as the count which charged that the concurrent use of an elaborate basing point pricing system by individual competitors constituted a section 5 violation. *Id.* at 180-81.

The combined effect of the Supreme Court opinion in *Cement Institute* and the Seventh Circuit decision in *Triangle Conduit* was to set off a storm of protest from Congress and industry. Many expressed the belief that the Commission was bent on making freight equalization practices illegal *per se*, and the Commission's conscious parallelism theory met strong opposition.[5]

Under the pressure of the situation, the Commission appeared to back away from its conscious parallelism theory.

[5] For scholarly examples of such opposition, *see* Kittelle & Lamb, *The Implied Conspiracy Doctrine and Delivered Pricing*, 15 Law & Contemp. Prob. 227 (1950); Hilder, *The Attack upon Delivered Price Systems*, 14 Geo. Wash.L.Rev. 397 (1946).

In response to written questions submitted by a Senate subcommittee investigating the Commission's pricing policies, a majority of the commissioners agreed that *Cement Institute* and *Triangle Conduit* applied only to "conspiracy situations." *Interim Report on the Study of the Federal Trade Commission Pricing Policies*, S.Doc. No. 27, 81st Cong., 1st Sess. 62-63 (1949) [hereinafter cited as *Interim Report*]. The *Interim Report* of the committee concluded that "the commission appears to have written off the theory that 'conscious parallel action,' absent conspiracy, constitutes an unfair method of competition under the [FTCA]." *Id.* at 62. *See also* Herbert, *Delivered Pricing as Conspiracy and as Discrimination: the Legal Status*, 15 Law & Contemp. Prob. 181, 198-99 (1950). Subsequent Commission decisions appear to have been grounded in findings of collusion, and this is the first case since *Triangle Conduit* in which the Commission has grounded its ruling on a finding of conscious parallelism. In at least one delivered pricing case, the Commission has dismissed the action for failure to demonstrate concerted action. *In re Crouse-Hinds Co.*, 46 F.T.C. 1114 (1950). See P. Areeda, Antitrust Analysis 318 (1974); *In re Virginia-Carolina Peanut Ass'n*, 51 F.T.C. 1156, 1184-86 (1955) (dictum).

Petitioners contend that the Commission's sworn public statements before the Senate committee constitute an administrative "rule" which binds the Commission in the present adjudication. In the alternative, they argue that the Commission has failed in its duty to explain its departure from the policy established by these public statements and the last 25 years of Commission practice. Although we have found the development of the law of delivered pricing to be instructive as to the issues in this case, in view of the approach we have chosen it is not necessary to reach these particular issues nor even finally to resolve whether conscious parallelism might ever support a section 5 violation.

It is important to stress that the weight of the case law and the Commission's own policy statement make it clear

that we are looking for at least tacit agreement to use a formula which has the effect of fixing prices. Indeed, none of the delivered pricing cases support a finding of a section 5 violation for the bare existence of an industry-wide artificial freight factor. In each case, the system had been utilized, tacitly or overtly, to match prices and avoid price competition. We thus hold that in the absence of evidence of overt agreement to utilize a pricing system to avoid price competition, the Commission must demonstrate that the challenged pricing system has actually had the effect of fixing or stabilizing prices. Without such effect, a mere showing of a parallel action will not establish a section 5 violation.

III.

We are thus faced with the issue whether the Commission's finding that the challenged practice had the effect of undermining price competition is supported by substantial evidence in the record, considered as a whole. We are mindful that the substantial evidence standard does not imply that "a court may displace [an agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951). At the same time, however, "[t]he [agency's findings] must nonetheless be set aside when the record before a Court of Appeals clearly precludes the [agency's] decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." *Id* at 490, 71 S.Ct. at 466. Thus, while we recognize the limited scope of the task, we are also aware that Congress has given courts the responsibility of assuring that administrative agencies stay within reasonable bounds. *See, e.g., id.; Evis Mfg. Co.* v. *FTC*, 287 F.2d 831, 848 (9th Cir.), *cert. denied*, 368 U.S. 824, 82 S.Ct. 43, 7 L.Ed.2d 28 (1961).

The case before us bears certain resemblances to classic basing-point cases. The Commission found that the plywood industry is a relatively concentrated industry in which the freight factor is an important element of price competition. Although there was no evidence to support a finding of overt collusion to adopt a pricing system which utilized West Coast freight in calculating prices, there is no doubt that it is the dominant industry-wide practice. In addition to the use of West Coast freight, the Commission found that other common practices had the effect of reducing uncertainty in industry pricing. It is an industry-wide practice, for example, to use certain estimated figures (called "association weights") for calculating the shipping weight of varying quantities of plywood sheathing. The Commission found that the use of universal association weights, based on prior experience with West Coast plywood rather than the actual experience of individual southern mills, also tended to reduce potential uncertainties in plywood pricing. In addition, industry members commonly rely on commercial price reporters, *Crow's* and *Randomlengths*, as the basis for setting the index price to which West Coast freight is added.

Despite these similarities, neither the Commission nor the administrative law judge (ALJ) purported to find that the pricing system here was used with the price-stabilizing purpose and effect of a classic basing-point system. Not only was there the lack of any overt collusion, but the ALJ specifically found that the complaint counsel had failed to prove that any of the practices engaged in by respondents resulted in exactly matching price offers to any customers. The ALJ acknowledged that, in spite of the practices described above, the range of available prices was sufficiently important that buyers expended time and effort probing the market by telephone for the most favorable price. Over the long run, the price for plywood sheathing rises or falls in response to market factors affecting supply and demand: housing starts, weather conditions, box car shortages and strikes. We have found no evidence in the record suggesting that the price of plywood has been unresponsive to market conditions.

Despite the evidence of bargaining over price and the apparent flexibility of price levels over time, the Commission found that the challenged practices had the tendency and effect of narrowing the range of transactional prices and stabilizing the price of plywood at higher than competitive levels. It reached these conclusions indirectly, largely by relying on indicators that West Coast freight operated as something more than a purely formal feature in a competitive price. These indicators included industry memos and statements characterizing West Coast freight "pick-up" as a source of income; the tendency of southern plywood mills to prefer eastward shipments which reap additional freight pick-up; invoices showing identical prices for shipments to different localities within the same West Coast freight zone, despite their varying distance from the production mill; and the use of West Coast freight in intra-corporate transfers. The Commission also emphasized that prices were computed on the basis of a rail freight factor when most southern plywood is delivered by truck and that buyers were unable to obtain a true f.o.b. mill price quotation.

Although the Commission acknowledged that it is impossible to know with any certainty what prices would have been without West Coast freight, it reasoned that the uniform addition of an artificial price factor would inevitably produce a higher-than-normal price. In light of this logic and its own findings that the freight factor was not a mere matter of form, the Commission held that the burden shifted to petitioners to show that the low, bargainable prices for southern plywood "systematically dissipate[d]" the effects of West Coast freight. When the petitioners failed to make such a showing, the Commission concluded that proof of the "extreme artificiality" of the West Coast freight pricing method was sufficient to establish an unfair method of competition.

Petitioners, on the other hand, contend that the evidence of competition in the index price of plywood, price fluctuations over time, and the consistently lower price of southern

plywood, rebut any inference that West Coast freight has actually had the effect of stabilizing the price level for southern plywood at noncompetitive levels. In addition, they argue that the preference for eastward shipments reflects their locational advantage over western mills and the tendency to ship away from "surplus production areas," rather than the seeking of an artificial price gain; that the Commission's finding of identical prices charged for shipment to varying distances within the same freight zone was based on an exaggerated estimate of the supporting evidence and the disregard of substantial rebuttal evidence showing that such prices do vary according to the actual freight costs; and that the Commission's reliance on the use of West Coast freight in intra-company transfer prices ignored the reality that market prices determine petitioners' wholesaler prices, not petitioners' accounting procedures. Petitioners also deny that f.o.b. prices are unobtainable. They argue that their cost discounts and the subtracting of actual freight costs provide a mill price based on a competitive delivered price despite the inclusion of West Coast freight.

Finally, by way of affirmative justification, petitioners observe that the record demonstrates that buyers generally prefer the form of delivered price quotations used in the industry. A closely related business justification for the continuation of the practice, according to petitioners, is the fact that southern plywood continues to compete with western plywood in many areas of the country. Buyers in these areas are particularly likely to prefer the ready price comparison between western and southern plywood made possible by the use of the West Coast index price.

We need not discuss all the evidentiary disputes between the parties to determine that there is not substantial evidence in the record, considered as a whole, to sustain the Commission's finding that petitioners' delivered pricing methods stabilized prices in the plywood industry at supra-normal levels. In truth, the Commission has provided us with little more than a theory of the likely effect of the challenged

pricing practices. While this general observation perhaps summarizes all that follows, we offer the following specific points in support of our conclusion.

There is a complete absence of meaningful evidence in the record that price levels in the southern plywood industry reflect an anticompetitive effect. Surely the evidence here falls far short of the evidence presented in virtually all of the classic basing-point cases. In the past the Commission has placed great stress on the inferences to be drawn from the "systematic matching" of prices. Indeed, in *Chain Institute, Inc.* v. *FTC*, 246 F.2d 231 (8th Cir.), *cert. denied*, 355 U.S. 895, 78 S.Ct. 269, 2 L.Ed.2d 192 (1957), for example, the Commission defended its final order by stressing that it may

> be fully complied with by competition in base prices, no matter what system of delivered pricing is used. If there is competition in the base prices there cannot possibly be any "systematic matching" of delivered prices.

Id. at 239 (quoting Commission's brief). *See also FTC* v. *National Lead Co.*, 352 U.S. 419, 426, 77 S.Ct. 502, 507, 1 L.Ed.2d 438 (1957); *Salt Producers Ass'n* v. *FTC*, 134 F.2d 354, 357 (7th Cir. 1943). In each of these cases, the Commission appeared to equate independent, and hence legal, use of a delivered pricing method with non-matching price quotations. *Cf. Triangle Conduit & Cable Co.* v. *FTC, supra*, 168 F.2d at 180 (focusing on inability of local buyers to obtain more favorable prices).

It is no real answer to this problem for the Commission to rely on its finding that the challenged pricing method had narrowed the range of quoted prices. The Commission makes the critical assumption that West Coast freight contributed substantially to pricing certainly over and above the unchallenged use of industry pricing reporters and was, therefore, responsible for the narrow range of prices for southern plywood. But the Commission offers no evidence to suggest that this narrow range resulted from the use of West Coast

freight or was itself an appropriate ground for suspicion. One commentator on delivered pricing has stated that "[w]ith any standardized commodity, identity [of price] tends to be the rule, for no seller can set a price higher than his competitors' and hope to make sales." Comment, *The Basing Point Issues, supra*, 58 Yale L.J. at 454. It is thus "an identity which is *unbroken* by hidden or open price-cutting over a variety of market conditions . . . which deserve suspicion." *Id.* (emphasis in original).

As we have seen, anticompetitive delivered pricing systems generally developed as a means of resisting market pressures for price cuts that might lead to feared price wars; they tend to reinforce rather than cause an anticompetitive market. Where market forces are not artificially harnessed by an elaborate pricing formula, the normal assumption is that prices will tend to be driven to competitive levels. Systematic matching of prices, unbroken by hidden or open price cutting, thus becomes the signal that market pressures are being artificially restrained.

The Commission itself has recognized these principles, not only in the cases cited above, but also in its official policy statement on delivered pricing. There "typically identical" prices became the watchword in the Commission's description of the various types of delivered pricing systems that would be "open to question." Commission Policy Statement, *supra*, at 4-5. Similarly, Professor Wilcox stated that "it is in their contribution to the identity of prices charged at any destination that delivered pricing systems find their real significance." *See* C. Wilcox, Public Policies Toward Business 230-31 (3d ed. 1965). We are aware that it is theoretically possible that prices could vary over time, as well as within some individual transactions, even when a monopolistic price is being charged. But such a theoretical possibility is not evidence that an anticompetitive price is being charged in the plywood industry. In light of the precedents and the statements of leading authorities on delivered pricing, including the Commission itself, the existence of substantial

bargaining in the base price of plywood provides at least a prima facie inference that competition has not been affected by the use of West Coast freight. The Commission has provided no substantial evidence to rebut that inference.

A related though perhaps less weighty point is the absence of any expert or other testimony sustaining the Commission's theory. The Commission acknowledged that this was a "close and unusual" case involving "a complex pattern of behavior which does not conform neatly to traditional models of guilty, or innocent, commercial conduct." 91 F.T.C. at 87. Yet with the Commission's case resting largely on sophisticated economic theories about the tendencies and effect of petitioners' actions, it is surprising that the record reveals a complete lack of pro-Commission expert testimony. The point gains additional significance in light of the expert testimony introduced by petitioners. An economics expert called by the industry, Dr. Steiner, testified that, in his opinion, the use of a West Coast freight factor had no effect on price. Relying on evidence of bargaining and the ability of buyers to hunt for the best price, Steiner concluded: "I don't believe that a change in the form in which I quoted that price will make me willing to accept a lower mill net realization." The Commission has cited no evidence that tends to disprove the common sense proposition that southern producers would simply adjust the index price upwards if they were quoting delivered prices in terms of actual freight. The ability of buyers to find different prices suggests that the converse is also true—the sellers vary the index price in accordance with location or other trade advantages.

Similarly, we place some significance on the complete lack of buyers testimony objecting to the practice. Indeed, buyers not only expressed the belief that the system had no effect on prices, but also frequently expressed a preference for receiving quotations in terms of West Coast freight. Although we recognize that plywood middlemen arguably would have little stake in an artificially imposed but uniform addition to

price that could readily be passed on to the consumer, we believe, nevertheless, that the complete lack of objection to the practice is another indicator pointing away from anti-competitive effect.

Finally, we do not find that the record data on costs and profits lends any additional support of the Commission's thesis. There is no question that the South's shipping advantage has been a source of profit to southern mills in competing with the West, with the net effect of attracting new entrants into the southern market until very recently. While the Commission acknowledged that this profit base was not only legitimate but essential in the early years of the southern industry, it concluded that the use of West Coast freight in calculating price had impeded natural forces that would have tended to drive prices and profits down. Again, however, the conclusion is largely a deduction from the Commission's reasoning about the tendencies of the challenged practice. The southern plywood industry is still relatively young and the most recent figures on costs and profits were equivocal at best.[6] The Commission itself acknowledged that because of the "numerous uncertainties and inadequacies in the cost and profit information available in this record" and the inherent uncertainties involved in profit analysis, 91 F.T.C. at 109, it "placed little reliance upon such data in [the] disposition of appeal." *Id.* at 97.

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[6] While both the Commission and the ALJ found that southern mills have consistently yielded higher profits than western mills, petitioners observe that the company focused on by the ALJ, Georgia-Pacific, earned approximately equal profits in its southern and western mills between 1973 and 1975. The ALJ attributed the declining profit figures for southern plywood in 1974-1975 to the nation's economic recession and strikes against southern mills. Without attempting to speculate on what would have occurred under normal circumstances, the data show that profits for western plywood were also affected by the recession but that the 1973 figures reflected a lower profit gap between western and southern plywood than that of most prior years.

In light of these observations, we agree with petitioners that the Commission's approach had the effect of requiring them to prove that the challenged practices had no effect on the level of prices in the plywood industry. The Commission justified this approach on grounds that it is impossible to know what prices would have been without the challenged practices. While we are sympathetic with the difficulties of proof in a case such as this, we are unable to sustain an approach that finds a non-collusive pricing method to be illegal despite the absence of some reliable indicator that the practice had an effect on overall price levels.

IV.

We discuss, finally, the Commission arguments suggesting that we should sustain the order on the basis of something less than substantial evidence that West Coast freight has produced an anticompetitive effect. First, we decline to follow the Commission's suggestion that industry-wide adoption of an artificial method of price-quoting should be deemed a *per se* violation of section 5 by analogy to section 1 price-tampering cases. *E.g, United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-23, 60 S.Ct. 811, 843-844, 84 L.Ed. 1129 (1940); *Plymouth Dealers Ass'n* v. *United States*, 279 F.2d 128, 132 (9th Cir. 1960); *Allied Paper Mills* v. FTC, 168 F.2d 600, 607 (7th Cir. 1948), *cert. denied*, 336 U.S. 918, 69 S.Ct. 640, 93 L.Ed. 1081 (1949). *Per se* analysis is justified by the inherent danger of our competitive system posed by agreements to fix prices. We thus refuse to allow parties to show the reasonableness of ineffectiveness of their efforts to tamper with "the central nervous system of the economy." *United States* v. *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 224 n.59, 60 S.Ct. at 845 n.59.

In *Allied Paper Mills*, for example, the Seventh Circuit utilized a *per se* analysis in sustaining the Commission's order, based on the Commission's finding of overt agreement as to all aspects of pricing, including "uniform base prices." 168 F.2d at 608. Although the court found evidence in the

record of uniform sealed bidding, petitioners in that case pointed to conflicting evidence that prices had not been invariably matching. The Seventh Circuit responded that "[t]he petitioners' temporary inability to carry through their purpose does not affect its illegality." *Id.*

The Commission asks us to find that the industry-wide use of West Coast freight constitutes a form of private control over the pricing process equivalent to conspiracy for purposes of *per se* analysis under section 5. We believe, however, that parallel behavior, without more, does not trigger the *per se* treatment which is given to overt agreement. Under our antitrust laws, we begin with the assumption that decisions are made independently and competitively. The debate over conscious parallelism comes down to whether it is ever appropriate for evidence of the anticompetitive effect of certain types of parallel conduct to serve as a substitute for the Sherman Act requirement of agreement. Without reaching that broader issue, we believe that to apply *per se* analysis to these facts would be to assume what must be proven, namely, that the use of West Coast freight by southern plywood producers is not a natural competitive response to buyer preference for traditional forms of price quotation, but rather is a deliberate restraint on competition. Without proof that the practice exerts an anticompetitive effect on the price of plywood, we have no reason to make such an assumption. *Cf.* Turner, *Agreement under the Sherman Act, supra,* 75 Harv.L. Rev. at 658-59 (conscious parallelism is evidence of agreement only if additional facts indicate that the decisions are inexplicable as ordinary competitive decisions).

Second, we are persuaded that a different result is warranted by the unique features of the FTCA. It is often repeated that the Commission was set up as an expert body with power "to restrain practices . . . which, although not yet having grown into Sherman Act dimensions would, most likely do so if left unrestrained." *FTC* v. *Cement Institute, supra,* 333 U.S. at 708, 68 S.Ct. at 807. *See e.g., FTC* v.

Motion Picture Advertising Serv. Co., 344 U.S. 392, 394-95, 73 S.Ct. 361, 363-364, 97 L.Ed. 426 (1953); *FTC* v. *Brown Shoe Co.*, 384 U.S. 316, 322, 86 S.Ct. 1501, 1504, 16 L.Ed.2d 587 (1966). The policies calling for deference to the Commission are, of course, in tension with the acknowledged responsibility of the courts to interpret section 5. *FTC* v. *Beechnut Packing Co.*, 257 U.S. 441, 453, 42 S.Ct. 150, 154, 66 L.Ed. 307 (1922); *Ger-Ro-Mar, Inc.* v. *FTC*, 518 F.2d 33, 38 (2d Cir. 1975). Moreover, the law of delivered pricing is well forged, having been developed by the Commission and courts over years of litigation. As we concluded in part II, the weight of the case law, as well as the practices and statements of the Commission, establish the rule that the Commission must find either collusion or actual effect on competition to make out a section 5 violation for use of delivered pricing. In this setting at least, where the parties agree that the practice was a natural and competitive development in the emergence of the southern plywood industry, and where there is a complete absence of evidence implying overt conspiracy, to allow a finding of section 5 violation on the theory that the mere widespread use of the practice makes it an incipient threat to competition would be to blur the distinction between guilty and innocent commercial behavior. Since we have found that there is not substantial evidence in the record to support the Commission's finding of anticompetitive effect, it follows that the Commission's order may not be enforced.

ENFORCEMENT DENIED.

Opposition

Supreme Court, U.S.
FILED
MAY 31 1982
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Nos. 81-1618 and 81-1619

IN THE

Supreme Court of the United States

October Term, 1981

WEYERHAEUSER COMPANY and
WILLAMETTE INDUSTRIES, INC.,
Petitioners,

v.

LYMAN LAMB COMPANY, et al.,
Respondents.

GEORGIA-PACIFIC CORPORATION,
Petitioner,

v.

LYMAN LAMB COMPANY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals err in concluding that the verdict of the jury with respect to the conspiracy and the measure of damages was supported by substantial evidence?

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Nos. 81-1618 and 81-1619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WEYERHAEUSER COMPANY and
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Respondents.

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Petitioner,

v.

LYMAN LAMB COMPANY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Pricing of Southern Plywood

Until the early 1960's, plywood was manufactured almost exclusively from Douglas Fir trees found primarily in the Pacific Northwest. In 1963, Petitioner Georgia-Pacific opened the first plywood mill in the South. Other defendant manufacturers, including Petitioners Weyerhaeuser and Willamette, quickly followed suit. These manufacturers agreed upon the same pricing system, charging the west coast mill price of each

shipment to which they added the rail freight that would have been payable if the plywood had been shipped from Portland, Oregon, to its destination.

By adopting the western mill price and adding the surcharge of "west coast freight," without regard to the actual shipping point, or cost, southern plywood manufacturers protected their western mills from the natural location advantage of southern mills and at the same time guaranteed southern mills the fixed profit from the artificially inflated and collusive freight charges.

In fact, the southern producers calculated for each plywood sale the amount of the difference between the "west coast freight" charged to their customers and the actual cost of freight. This difference, referred to in the industry as "freight pick-up" (TR. 211, 212) [1] or "freight gain" (PX 207), was regularly included in producers' budgets (PX 610-11, 728, 729) and shown on their books as a "revenue" or "profit" item.[2] Southern plywood could not be purchased without paying for nonexistent freight. TR. 2123-24, 1994, 1996-7.

B. Pricing of Western Plywood

Western plywood manufacturers uniformly used "standard weights," also known as "association weights," to calculate the amount of freight to be charged the customer of western fir plywood. These standardized weights nearly always were greater than the actual weight of western fir plywood. TR. 176, 1040-42; PX 347. The manufacturers, however, paid freight to the carriers based upon the actual weight of the shipment. The difference betwen the higher freight charged the customer and the actual freight paid to the carrier on each sale—known in the industry as "underweights"—also was shown on the manufacturers' books as a revenue item and considered "additional profit." [3] No manufacturer would grant refunds

1. "TR." herein refers to the trial transcript; "PX" refers to plaintiffs' [Respondents'] exhibits; "DX" refers to defendants' [Petitioners'] exhibits.

2. TR. 616, 750, 751, 752, 754, 755, 728, 729, 912, 530, 524, 525, 320, 322, 248, 259, 260, 465-93; PX 903; TR. 1531-32, 1559, 1716.

3. TR. 569, 1403-4, 1409, 1664-5, PX 450, 519, 713-14, 708-10, 59-70, 347.

to customers who complained about these "underweight" or "phantom freight" charges. PX 347.

C. The Proceedings Below

This litigation commenced in the Eastern District of Louisiana in 1972 as a class action on behalf of plywood purchasers who claimed damages by reason of a price fixing conspiracy involving numerous plywood manufacturers. Trial commenced on October 16, 1978 before the Honorable Sam C. Pointer, Jr.—who had been specially designated to preside over this multi-district litigation—on "all issues except the amount of damages sustained by individual plaintiffs, intervenors and class members." Pre-Trial Order 9, Vol. 35, 1st Supp., p. 20,416-17.[4]

The jury was instructed[5] that in order for it to find a conspiracy it must find an "agreement" between two or more of the defendant companies. App. A, TR. 3531-40. The instructions charged that plaintiffs had the burden to prove (1) that the Petitioners entered into a conspiratorial agreement to fix prices (App. A, TR. 3543-44); (2) that the conspiracy caused financial damage to the people who bought plywood (App. A, TR. 3552); and (3) the amount of damage. App. A, TR. 3555-56.

On November 14, 1978 the jury returned a special verdict (Pet. App. I)[6] that Petitioners, together with the other named manufacturers of southern plywood, had engaged in a conspiracy to fix prices from February 23, 1968 to December 31, 1973 (hereafter the "damage period"). The jury found that the conspiracy caused financial damage to purchasers of southern plywood in the amount by which "west coast freight"

4. References to "Vol. —" are to the clerk's record on appeal. The trial record, which Petitioners have described as voluminous, consists of 13 boxes of exhibits in evidence, 3600 pages of trial transcript and 138 volumes of pleadings and tran ripts. See Petitioners' Application for Extension of Time, dated January 13, 1982.

5. The jury instructions relating to all antitrust issues are set out in full in Appendix A hereto (hereafter "App. —"), pp. 3521-56; 3592-98.

6. References to the Joint Appendix of Petitioners for a Writ of Certiorari will be referred to as "Pet. App. —".

paid by purchasers exceeded the actual freight paid by Petitioners and other manufacturers. Similarly, the jury determined that the conspiratorial use of "standard weights" by manufacturers of western fir plywood caused financial damage to purchasers in the amount by which freight paid by them on the basis of "standard weights" exceeded the actual freight paid by the shippers.

The District Court denied Petitioners' motions for judgment notwithstanding the verdict and for a new trial, *In Re Plywood Antitrust Litigation,* 1979-1 CCH Trade Cases ¶ 62,459 (E. D. La. 1978), and entered judgments in favor of plaintiffs on the special verdict. Vol. 32, p. 22,918, Pet. App. C. The District Court had also independently determined that the evidence was "sufficient not merely to create a jury issue but also to cause [the Court], like the jury, to find that there was a conspiracy and that the three defendants were parties to that conspiracy." *Id.* at p. 76, 697, Pet. App. C-3. Respondents' motions for summary judgment as to the dollar amount of their individual damages in accordance with the jury's verdict were granted, and the District Court entered judgments pursuant to a memorandum opinion dated February 14, 1980, Vol. 34, p. 23,552; 23,581-85, Pet. App. B.

Petitioners appealed from the denial of their motion for judgment notwithstanding the verdict and from these judgments.[7] The Court of Appeals reviewed the record evidence and unanimously affirmed the jury's verdict and the judgments entered pursuant thereto. *In Re Plywood Antitrust Litigation,* 655 F. 2d 627 (5th Cir. 1981). Pet. App. A. Petitions for Rehearing and Rehearing En Banc were denied, no judge voting for rehearing. Pet. App. G.

The District Court is now proceeding with resolution of issues relating to the class action including the "calculation of individual damages for other class members". G. P. Pet. p. 11, fn. 5. Other issues still not finally resolved include the application of the statute of limitations to class members' claims, prejudgment interest and attorneys' fees.

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7. Petitioners' "Statement of the Issues" on appeal to the Court of Appeals is set forth in App. B hereto.

REASONS FOR DENYING THE WRIT

Each court below found the evidence sufficient under long-settled legal principles to support the jury's findings (a) that the Petitioners engaged in an unlawful conspiracy to fix the price of plywood, (b) that the conspiracy resulted in increased delivered prices of plywood, equal to (1) the difference between "west coast freight" charged purchasers by the conspirators and the actual freight paid by manufacturers of southern plywood, and (2) the difference in freight charged based on standard weights as opposed to payments based on actual weights of western plywood.

This is not a case in which conspiracy was inferred from evidence of parallel business conduct, either alone or combined with communications affording only an opportunity to conspire. In fact, the jury was specifically instructed that such evidence is not in itself sufficient to sustain an inference of conspiracy. App. A, TR. 3538.

The record is replete with direct evidence showing an actual agreement to fix prices.

Similarly, this is not a "single element" price fixing case. The evidence at trial showed that the purpose and the effect of the collusive pricing system were to increase the delivered price of southern plywood to that for western plywood, thus fixing the whole price of the product. The jury's finding as to the measure of damages was not based solely upon consideration of the freight element of the price; rather, it was supported by expert and deposition testimony and documentary evidence that the conspirators raised the total price charged to buyers of plywood by the full amount of the increased freight charges resulting from the conspiracy.

In short, the "questions" urged by Petitioners simply are not issues presented by the voluminous evidence and record in these cases.

Petitioner Georgia-Pacific's claim that the Court of Appeals misapplied the "slight evidence" rule in finding "absent" parties members of the conspiracy, and the claim of Petitioners Weyerhaeuser and Willamette that the special interrogatories to the jury denied them due process are raised for the first time

here and are not properly before this Court; [8] moreover, they otherwise lack merit.

There is no conflict between the legal standards applied by the courts below and those applied in the decisions cited by Petitioners. Nor is there any inconsistency between the outcome of this case and the decision of the Court of Appeals for the Ninth Circuit, *Boise Cascade Corp. v. F. T. C.*, 637 F. 2d 573 (9th Cir. 1980), denying enforcement of a Federal Trade Commission order which enjoined the Petitioners' pricing system under a different statute, theory and factual record from those involved in this case.

In fact, the only question which may be properly presented to this Court is the sufficiency of the evidence to support the jury verdict—a question on which both of the courts below previously have ruled against Petitioners,[9] and one which is in any event inappropriate for consideration at this time by this Court.[10]

A. The Jury Verdict Is Supported by Direct Evidence of Conspiracy

Petitioners mischaracterize the Court of Appeals decision as standing "for the proposition that parallel pricing practices, coupled with inter-company communications reflecting an opportunity for conspiracy, can support a finding of illicit agreement." Wey. Pet. p. 12.[11] To the contrary, the Fifth Circuit reviewed the record and concluded that there was direct evidence of conspiracy:

> [T]here is substantial evidence, as defined in [*Boeing v. Shipman*, 411 F. 2d 365 (5th Cir. 1969)] from which a

8. *Ernst & Ernst v. Hochfelder*, 425 U. S. 185, 193 (1976), *Tennessee v. Dunlap*, 426 U. S. 312, 314 (1976).

9. *Berenyi v. District Director Imm. & Nat. Serv.*, 385 U. S. 630, 635 (1967).

10. *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508 (1924), *Houston Oil Co. v. Goodrich*, 245 U. S. 440 (1918).

11. The Petition of Weyerhaeuser Co. and Willamette Industries, Inc. will be referred to as "Wey. Pet. p. —"; the Petition of Georgia Pacific Corp. will be referred to as "G. P. Pet. p. —".

reasonable jury, both *directly* and circumstantially, could find the existence of a conspiracy to fix prices." (*Id.*, at 633, emphasis added).

Petitioners' assertion that the jury was free to return a verdict of liability if "it found nothing more than parallel pricing behavior and an opportunity for competitors to communicate" (G. P. Pet. p. 13) is equally incorrect. In fact, the jury was instructed [12] that "for there to be a conspiracy there must be two or more separate manufacturers who are agreeing to use in this case West Coast freight or standard weight in the sales by them to other persons of their plywood products." App. A TR. 3534. The requirement that the jury must find an *agreement* to conclude there was a conspiracy was repeated seven times,[13] and the jury was told specifically that it could *not* base a finding of conspiracy on parallel conduct. App. A, TR. 3527-28, 3539, 3597. The instructions stated that neither "'talking with one another, obtaining price information from one another, buying from one another" (App. A, TR. 3536) nor the "opportunity to meet or to agree" was sufficient to support an inference of conspiracy. App. A, TR. 3538.

When the evidence in the record is considered in light of these instructions, it becomes clear that the issue before this Court, if any, is the sufficiency of the evidence to support the verdict.[14] The following are examples of that evidence.[15]

1. Underweight Profit on Western Plywood

Mr. Harries, an officer of Petitioner Georgia-Pacific, testified that the manufacturers shipped plywood using the "agreed

12. The jury instructions relating to antitrust issues are set out in full in App. A.

13. App. A, TR. 3528, 3530-31, 3533, 3535, 3593, 3594, 3596.

14. Since both the District Court and the Court of Appeals have held that the verdict is supported by the evidence, further review in this Court in inappropriate under the "two Court rule." *Berenyi v. District Director Imm. & Nat. Serv.*, 385 U. S. 630, 635 (1967).

15. Respondents are entitled to have all inferences from this evidence drawn in their favor. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U. S. 690, 696 (1962).

on" association weights. Since "the actual weight of what was shipped was less, they pocketed as an additional profit . . . freight . . . that didn't exist." TR. 569. This pocketing of underweights as an additional profit was "standard in the industry". TR. 569. Petitioner Willamette also referred to these weights as "agreed on". TR. 1711, 1692-3, 247-50, 565-69. This practice was followed throughout the industry (PX 347, 837; TR. 1915) and the petitioners treated "underweights" on their corporate financial records as an item of revenue and profit.[16] Plywood buyers could not avoid paying for the "underweights." PX 347.

Petitioners' briefs do not even address the evidence on the underweights issue.

2. Freight Gain Profit on Southern Plywood

In characterizing the evidence on this point as showing only an "opportunity to conspire," Petitioners disregard the substantial direct evidence of conspiracy. In PX 10, quoted by the Court of Appeals (655 F. 2d at 634, Pet. App. A-8), Petitioners documented a telephone conversation in which Weyerhaeuser assured Georgia-Pacific that it was not shifting to "an FOB mill pricing policy" on southern plywood, i.e., away from the west coast pricing system. Weyerhaeuser further assured Georgia-Pacific that it would continue to use the west coast pricing system to maximize freight gain by "dropping their truck customers in poor freight gain areas".[17] TR. 779-782.

Weyerhaeuser, in turn, was assured by Georgia-Pacific that that it would "resist all possible sales" of southern plywood in New England due to poor "freight return". PX 182.

Georgia-Pacific computed freight gain on each sale (PX 207, 410, 589) and carried freight gain on its books as a revenue item. TR. 616, 623-24, 610-11, PX 20, 248, 259, 465-73.

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16. TR. 632, 1664-1665, 1409, 1403, 632-34; PX 837, 295-97, 221, 430-33, 708-10, 713-15, 788-90, 59-70, 519, 446-50.

17. Petitioners' assertion that the documents quoted by the Court of Appeals do not relate to the subject of the conspiracy is wrong. Wey. Pet. p. 15. Freight gain was the essence of the conspiracy.

Weyerhaeuser agreed with Willamette that it would not sell southern plywood in areas where freight gain would be reduced. PX 748.

U. S. Plywood wrote to Kirby Lumber stating the need for "stabilizing" plywood prices when they were experiencing "price cutting," and stabilized the price by guaranteeing Kirby "average freight pickup of at least 70¢." PX 377.[18]

Even though Weyerhaeuser and Georgia-Pacific had no legitimate business dealings together [19] and did not buy from or sell plywood to each other (TR. 310-12, 341, 451, 574, 581-82, 923-24) their officers agreed that these two companies would keep in "direct contact" through "weekly phone conversations" to "secure specific competitive information". PX 180. The written memoranda of these "weekly phone conversations" acknowledged that such "direct communications" involved "risks" (PX 182) because they recorded, among other things, the fact that Georgia-Pacific had directly informed Weyerhaeuser of its ongoing pricing practices. PX 183, 189, 191, 182, 795-97. The documented evidence of direct communication on such sensitive "specific competitive information" (655 F. 2d at 633, Pet. App. A-7) is copious.[20] Competitors do not share "specific competitive information" except to conspire.

B. Petitioners' Collusive Pricing System Fixed the Entire Price of Plywood

Petitioners' assertion that the jury verdict is erroneous because it applies a "single element" measure of damages is wrong both as a matter of fact and as a matter of law under *Catalano, Inc. v. Target Sales, Inc.*, 446 U. S. 645 (1980).

The jury was instructed that the plaintiffs had the burden to prove that the challenged pricing system was the result of a

18. There cannot be more direct evidence of a price fixing conspiracy. *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 221-22 (1940).

19. Unlike the facts in *Weit v. Continental Illinois Nat. Bank & Trust Co.*, 641 F. 2d 457 (7th Cir. 1981), *cert. den.* — U. S. — (1982), *infra*, and *Venzie Corp. v. United States Mineral Products Co.*, 521 F. 2d 1309 (3d Cir., 1975), *infra*, page 15.

20. PX 180, 182, 183, 189, 191, 192, 749, 193, 172, 177, 174, 178, 179; TR. 779-782.

conspiracy, and also that it "caused financial damages to the people that bought plywood" App. A, TR. 3552. The District Court expressly charged that it was for the jury to determine whether this pricing system was a means of quoting and comparing prices or whether it raised the price of southern plywood (App. A, TR. 3522-23) and if so whether it raised the price by the amount of the charges for non-existent freight. App. A, TR. 3553-56.

Petitioners' own economic expert testified that if the evidence showed price increments for southern plywood increasing according to west coast freight zones where supply exceeded demand, he would conclude this was "not a competitive market with a demand and supply result". TR. 3118. The evidence showed that these were the facts in the plywood industry.[21] Other economists have recognized that the "Portland-plus system used for plywood into the 1970's" could only exist when collusively adopted. F. M. Scherer, *Industrial Market Structure and Economic Performance*, p. 327 (2d Ed. 1980).

Substantial evidence in the record establishes that the delivered pricing system, which the petitioners conspiratorially utilized, fixed the *full delivered price of* southern plywood by raising the delivered price of southern plywood to match the delivered price of western plywood. PX 233,[22] 227, 728, 729; Petitioners' executives testified that this was accomplished "by taking the *mill FOB west coast price* and adding west coast freight to the destination for the southern pine plywood" to get the delivered price. TR. 1100-01; *accord* 824, 811, 826,

21. PX 539, 209, 393, 418, TR. 2215-17, 1068, 2295, 616, 950-51; 2958-59, 3022, 3025-26, 3120, 3019, 2471-72.

22. Exhibit 233, a letter written by Weyerhaeuser in 1970 (the heart of the damage period here), reads in part:

> ". . . it is hardly news that Southern Pine plywood cannot be picked up on a straight F. O. B. mill base to save the West Coast applied freight. This is an equalizer that has been going on in the market for as long as Southern Pine plywood has been manufactured."

Petitioners did not dispute this letter at trial nor did they call a single witness to rebut its contents.

1994. Petitioners' actual price lists confirm this. See, *e.g.*, PX 213, 219.

Petitioners' own expert economist testified that in a competitive market delivered prices would be computed by adding "actual freight" to FOB mill prices. TR. 3159. Petitioners instead collusively added west coast freight to the FOB mill price for southern plywood. PX 213, 219, 521, 501D, 153, 734, 739, 833, 903.

Respondents' economic expert also testified, based upon the evidence before the jury (TR. 2351), that the pricing system for southern plywood was not consistent with competitive market behavior (TR. 2357) and resulted in increased prices in the measure of damages found by the jury. TR. 2365-69.

The Court of Appeals recognized that there was conflicting testimony from expert economists for both sides, as well as other conflicting evidence in the record, but it concluded that the jury "chose to accept the testimony of [Respondents'] economist and to reject the contrary testimony of [Petitioners'] economist." 655 F. 2d at 635. Pet. App. A-11.

Petitioners' arguments are equally wrong as a matter of law.[23] Petitioners urge that this Court must assume their conclusion that the freight gain which was the subject of the conspiracy was completely offset by concessions to customers in the product element of the price. This Court rejected that as-

23. Petitioners erroneously assert that the following statement by the Ninth Circuit in *Boise, supra,* is a dispositive statement of the law of damages in this case:

> "The Commission has cited no evidence that tends to disprove the common sense proposition that southern producers would simply adjust the index price upwards if they were quoting delivered prices in terms of actual freight." (637 F. 2d at 580).

Such a "common sense proposition" was expressly rejected in *Catalano, Inc. v. Target Sales, Inc.*, 446 U. S. 643, 649 (1981), *infra.* Further, the above statement is premised *entirely* upon the failure of the FTC to produce evidence in prosecution of its case under § 5 of the FTCA. Plaintiffs did present such evidence to the jury, i.e., the purpose and effect of the conspiracy was to equalize the delivered prices of southern and western plywood.

sumption in *Catalano, Inc. v. Target Sales, Inc.*, 446 U. S. 643 (1981), stating:

> It is virtually self-evident that extending interest-free credit for a long period of time is equivalent to giving a discount equal to the value of the use of the purchase price for that period of time.
>
> • • •
>
> While it may be that the elimination of a practice of giving variable discounts will ultimately lead *in a competitive market* to corresponding decreases in the invoice price, *that is surely not necessarily to be anticipated.* It is more realistic to view an agreement to eliminate credit sales as extinguishing one form of competition among the sellers." *Id.*, at 648-49. (Emphasis added).[24]

The present case is in complete accord with the recent *Catalano* opinion which held that the impact of fixing a single element of price is not to be assumed away, even in a competitive market. Further, in the present case Respondents proved this was *not* a competitive market.

C. There Is No Conflict in the Circuits

1. There Is No Conflict Between the Fifth Circuit and the Ninth Circuit Decisions

Petitioners assert that a "direct conflict" between the Fifth Circuit's decision in this case and *Boise Cascade Corp.*

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24. This Court's decision in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U. S. 557 (1981) does not, as Petitioners claim, support their position. The Court of Appeals' decision in *Payne* was vacated because the failure of the Court of Appeals to find a violation made it inappropriate to consider the sufficiency of evidence of damages. This Court remanded the matter, holding:

> "Absent such a finding, we decline to apply to this case the lenient damage rules of our previous cases. Had the court below found a violation, we could more confidently consider the adequacy of petitioner's evidence." 451 U. S. at 568.

The finding of a violation here by the jury and by both Courts below makes *Payne* inapposite.

v. F. T. C., 637 F. 2d 573 (9th Cir. 1980) "presents the paradigm for granting certiorari". Wey. Pet. p. 10. In fact, there is no conflict between these circuits on any question of law, because each was decided under different statutes and upon separate and factually different evidentiary records. Factual evaluations are not a basis for review in the Supreme Court.[25]

As Petitioners' former lead counsel recognized at an earlier stage of these proceedings: "we are faced with an entirely different case than the one alleged in the Federal Trade Commission complaint" (p. 20) and "the issues on the merits are not remotely comparable". Pp. 26-27.[26] The Fifth Circuit rejected any relevance of the Ninth Circuit opinion for these same reasons, stating:

> "Defendants argue that 'the Ninth Circuit findings, when they become final, should collaterally estop plaintiffs in this action on every principal issue.' We reject that position. The FTC proceeding tested the conduct of these defendants and others under § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45 (1976). Plaintiffs brought suit against these defendants and others under § 1 of the Sherman Act, 15 U. S. C. § 1 (1976). The Commission expressly declined to reach the conspiracy issue, stating that it was unnecessary to a determination under § 5. *Boise Cascade Corp.*, 91 F. T. C. at 102. Here, plaintiffs proved a conspiracy to the satisfaction of the jury and of the district court. The record evidence presented to the jury and court below included testimony by witnesses who did not appear before the Commission. Significantly, the FTC staff presented no expert testimony in support of its case, whereas plaintiffs below put their expert economist before the jury. In short, we are not

25. *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508 (1924), *Houston Oil Co. v. Goodrich*, 245 U. S. 440 (1918).

26. Hearing before the United States District Court, Eastern District of Louisiana, January 26, 1977. Transcript pp. 20-27, Vol. 40, Doc. No. 1893, p. 17,379, comments of Hammond E. Chaffetz, Esq.

bound by the Ninth Circuit's opinion in *Boise Cascade*." 655 F. 2d at 636 fn. 2. Pet. App. A-13.

The Ninth Circuit expressly based its decision to decline enforcement of the FTC order upon the following errors and omissions by the FTC in the presentation of its case, none of which has any relevance to the jury verdict.

1) The Commission erroneously grounded its finding of an unfair trade practice solely upon the adoption of a basing point pricing system (637 F2d at 576) which had long since been rejected as a basis for violating Section 5 of the FTCA. The FTC did not present evidence of collusion because collusion was not the theory on which it prosecuted its case.[27]

2) The Commission erroneously shifted the burden of proof to the plywood companies to show that the artificial pricing system had no effect on prices rather than require the Commission to meet its burden of proof to show that it did have an effect on prices. *Id.*, pp. 578-580. The record before the FTC contained no evidence that the pricing practice affected prices because, due to this shift in the burden, the FTC made no attempt to show that it affected prices.[28]

3) The Commission erroneously based its case largely on esoteric economic theories but presented no expert testimony to support those theories. *Id.*, p. 580.[29]

4) The Commission put on no evidence that buyers of plywood objected to this pricing practice. *Id.*, p. 580.[30]

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27. The record at bar contains substantial direct evidence of collusion (See 655 F. 2d at 633, Pet. App. A-6), from which the jury found a violation of Section 1 of the Sherman Act.

28. Respondents submitted substantial evidence to the jury that the collusive pricing system did effect prices (See 655 F. 2d at 634-35, Pet. App. A-9).

29. Respondents presented expert testimony in support of their case to the jury (See 655 F. 2d at 635, Pet. App. A-11).

The Ninth Circuit repeatedly stated that the basis for its decision was that the evidence in the record before the FTC was insufficient. *Id.*, pp. 577, 578, 579. The Fifth Circuit properly held that the Ninth Circuit opinion had no bearing on the present case. 655 F. 2d 636, fn. 2, Pet. App. A-13.

2. There Is No Conflict Between the Fifth Circuit Decision and the Law in Other Circuits

Petitioners also attempt to invoke a conflict between the Fifth Circuit opinion below and the opinions in *Venzie Corp. v. United States Mineral Prods. Co.*, 521 F. 2d 1309 (3d Cir. 1975); *Weit v. Continental Ill. Nat'l. Bank & Trust Co.*, 641 F. 2d 457 (7th Cir. 1981), *cert. den.* — U. S. — (1982), and *Tose v. First Pennsylvania Bank*, 648 F. 2d 879 (3d Cir. 1981), *cert. den.* — U. S. —, 102 S. Ct. 390 (1981), which held that a conspiracy could not be based purely upon parallel conduct.

In none of these cases was there any evidence of conspiracy such as is contained in this record. In *Venzie*, at the only meeting between defendants, the alleged group boycott was *not* discussed. 521 F. 2d at 1313. In *Tose*, there was no evidence that competitors had in fact communicated at all, 648 F. 2d at 894, the only evidence in the record being a *denial* by the defendant banks that they had communicated. *Id.* Similarly, in *Weit*, where the "parallel conduct" was merely charging the maximum interest allowed by the usury law, the evidence showed that the communication among defendant banks was not only innocuous but had been monitored by counsel to guard against antitrust implications, and further that defendant banks had the need to set up a compatible credit card system which necessitated a degree of cooperation and communication. 641 F. 2d at 461. Moreover, in *Venzie* and *Weit*, the respective defendants had legitimate and necessary business dealings with each other, which Petitioners Georgia-Pacific and Weyer-

30. Contrary to the assertions of Petitioners, Respondents presented substantial evidence of buyer objection to the pricing system, PX 1, 2, 44, 233, 347, TR. 2134-35. Amici Bowie-Sims-Prange, Inc., et al. are attempting merely to present evidence to this Court of the type which the jury rejected.

haeuser in this case did *not* have, when they exchanged "specific competitive information" (PX 180), since they did not sell or buy plywood to or from each other (TR. 310-12, 451, 341, 574, 581-82, 923-24).

The Fifth Circuit independently reviewed the record and concluded that the verdict was fully supported by the evidence. 655 F. 2d at 633, 634, 635. Pet. App. A-6, 9, 10, 11. Indeed, the Fifth Circuit stated that it would not continue "belaboring the point by citation of further examples of the evidence in the record." 655 F. 2d at 634, Pet. App. A-8.

In sum, because the quality and quantity of evidence in this case is not at all as Petitioners characterize it, the "conflict" they posit with the Third and Seventh Circuits does not exist.[31]

D. The Measure of Damages Was Properly Presented to the Jury

Petitioners argue that their counsel misunderstood the nature of the October, 1978 trial and were surprised that the measure of damages was put to the jury. This is purely a question of fact which has been resolved against Petitioners

31. Contrary to the contentions of The Business Roundtable in its Motion for Leave to File a Brief as Amicus Curiae, there is also no conflict in the circuits with respect to the sufficiency of evidence required to establish the amount of damages in an antitrust action. Neither the First Circuit in *Ford Motor Company v. Webster's Auto Sales, Inc.*, 361 F. 2d 874 (1966) (comparing profits before and after the violation) nor the Fifth Circuit in *Hobart Bros. Co. v. Malcolm T. Gilliland, Inc.*, 471 F. 2d 894, *cert. den'd.* 412 U. S. 923 (1973) (allowing a terminated distributor damages equal to the estimated profit on future sales to specific customers, based upon past sales to those customers) permitted a jury to base findings of antitrust damages upon proof which "borders on the speculative". Indeed, no circuit permits recovery of speculative damages, and the Court of Appeals did not apply such a standard here. 655 F. 2d at 635, Pet. App. A-9. The Court of Appeals opinion is in complete accord with *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 124 (1969), *Bigelow v. RKO Radio Pictures, Inc.*, 327 U. S. 251, 264-66 (1946), *Story Parchment Co. v. Paterson Parchment Co.*, 282 U. S. 555, 563-66 (1931).

by both the District Court and the Court of Appeals.[32] No important or novel question of law would be resolved by having this Court again review the facts upon which Petitioners' counsel contend they were surprised.

Petitioners suggest that the District Court's reference to counsel's "sincerity" is dispositive. However, a full reading of the Court's remarks clearly indicates that Petitioners are incorrect.[33]

The Court of Appeals recognized that under its prior decision in *Alabama v. Blue Bird Body Co.*, 573 F. 2d 309 (5th Cir. 1978), the bifurcation was not improper. 655 F. 2d at 636, Pet. App. A-11-12.

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32. The Fifth Circuit summarized these facts at 655 F. 2d at 635-6, Pet. App. A-11.

Moreover, on January 27, 1977 [20 months prior to trial] Judge Pointer, upon redefining the classes, informed all counsel specifically on the topic of separate trials and the nature of the trial to be held in this case:

"[I]t is my view that you have got to bring the entire cause of action of the class members into the case . . . there's got to be a bringing in of the claim for damages as well as impact and statutory violation." (p. 23 Vol. 40, document 1893 beginning at page 17,379).

33. The District Court stated:

"I continue to believe that defendant, or defendants, are in error and cannot take advantage of their claimed surprise in this point, that the matter was clear under the [March 27, 1978] pretrial order and under the original instructions to the jury at the outset.

"The quotation given by defense counsel at the beginning of this argument is to me a clear statement of the problem. Defense counsel began argument on this motion this afternoon by saying that what the Court had told the jury was that it was not going to be deciding the question as to the measure of impact or damage. And, yet, when we go to the words of the Court, that is not what the Court said. It, rather, instructed the jury that they were not going to be deciding the amount of damages by individual plaintiffs.

"It may very well be and the Court has no reason to doubt sincerity of defense counsel in perhaps equating those two terms. The Court's view is that those two terms are not identical. They are not identical semantically, and they are not identical in the eyes of the law." Vol. 59, TR. 23,655-56. (Emphasis added)

E. Petitioners Raise Two Issues for the First Time in Their Petitions to This Court

The following issues are not properly before this Court due to Petitioners' failure to raise them in the Court of Appeals. *Ernst & Ernst v. Hochfelder,* 425 U. S. 185 (1976), *Tennessee v. Dunlap,* 426 U. S. 312 (1976).

1. The Special Interrogatories to the Jury on Measure of Damages Were Proper

The claim that Petitioners were denied due process by the form of special interrogatories 2(b) and 4(b) on measure of damages is raised for the first time in this petition,[34] and otherwise lacks merit.

At trial the Petitioners also failed to object to the form of the measure of damages interrogatories and they did not offer an alternative form of damage interrogatory. TR. 3572-74. This was a tactical decision by Petitioners.[35] 655 F. 2d at 635, Pet. App. 11-635-36. By their failure to demand that such an alternative interrogatory be submitted before the jury retired, Petitioners waived the right to have any alternative measure of damages submitted to the jury. Fed. R. Civ. P. 49.[36] *See Hyde v. Land-of-Sky Regional Council,* 572 F. 2d 988 (4th Cir. 1978); *United States ex rel. Greenholgh v. F. D. Rich Co.,* 520 F. 2d 886 (9th Cir. 1975); *Fredonia Broadcasting Corp. v. RCA Corp.,* 481 F. 2d 781 (5th Cir. 1973).

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34. See Petitioners' Statement of Issues raised on appeal to the Court of Appeals. App. B.

35. At trial and in the Court of Appeals Petitioners' strategy was to contend not only that there was no conspiracy which fixed the price or any element of price, but that even if there were such a conspiracy it had no effect on price. Petitioners accordingly offered no evidence that even though they fixed one element of price they partially offset that fixed element by adjustments of other elements. While potential *amici* urge this Court to address the measure of damages in "one-element price fixing cases" it is respectfully submitted that this Court should not consider an issue not properly raised below.

36. Rule 49(a) of the Federal Rules of Civil Procedure provides:

"... each party waives his right to trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury."

Even if Petitioners had preserved the issue by a timely objection or demand, the measure of damages interrogatories put to the jury were proper. Interrogatories 2(b) and 4(b) call for a "yes" or "no" answer, neither answer being more suggested than the other. The jury was properly instructed to answer "no" unless they found that the plaintiffs had met their burden of proof as to amount of damages, in which event they were to answer "yes." App. A, TR. 3553-56. Questions which follow the elements of the plaintiffs' case and plaintiffs' burden of proof, asking for a "yes" or "no" answer, are the preferred form of question. *Jackson v. King*, 223 F. 2d 714 (5th Cir. 1955); *Merced v. Auto Pak Co.*, 533 F. 2d 71 (2d Cir. 1976); Devitt and Blackman, *Federal Jury Practice and Instructions* (3rd Ed.), Sections 6.07 and 74.10. The Courts have rejected questions to the jury stated in the alternative as Petitioners now suggest. *Dougherty v. Continental Oil Co.*, 579 F. 2d 954 (5th Cir. 1978).

2. The Evidence Against Other Co-Conspirators Was Substantial

Petitioner Georgia-Pacific raises for the first time in its Petition to this Court, an issue that the District Court erroneously applied the so-called "slight evidence" rule as to co-conspirators. See Petitioners' "Statement of The Issues" to the Court of Appeals. App. B.

The rule to which they refer states:

> "Once a conspiracy has been established, slight evidence is needed to connect a particular participant."

United States v. Consolidated Packaging Corp., 575 F. 2d 117, 126 (7th Cir. 1978). That rule is correct and uniform.[37]

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37. *Nye & Nissen v. United States*, 168 F. 2d 846, 852 (9th Cir. 1948), *aff'd* 336 U. S. 613 (1949); *United States v. Cadillac Overall Supply Co.*, 568 F. 2d 1078, 1087 (5th Cir.), *cert. den.*, 437 U. S. 903 (1978); *United States v. Braasch*, 505 F. 2d 139, 148 (7th Cir. 1974), *cert. den.*, 421 U. S. 910 (1975).

In fact, the instructions given by the District Court required more onerous proof of plaintiffs and were far more favorable to defendants. App. A, TR. 3537, 3549, 3550. Petitioners did not object to any aspect of the charge relating to the "slight evidence" rule thus waiving this point; nor did Petitioners raise any such issue on appeal to the Court of Appeals.

Moreover, direct, substantial evidence linked the co-conspirators to the conspiracy. For example, Mr. Tweedie, an officer of Petitioner Weyerhaeuser whom the Fifth Circuit found to be one of the principal actors in the conspiracy (655 F. 2d 633-34, Pet. App. A-8), documented his communications with the absent co-conspirators on such competitively sensitive subjects as price (PX 180, 182, 183, 189, 191); the west coast freight pricing system for southern plywood (PX 182, 183); stock-piling of plywood (PX 193); transfer pricing (PX 180); contract sales prices (PX 180); outside plywood purchases (PX 180); production capacity (PX 180, 192); actual production (PX 749) and maximizing freight return (PX 182). These memoranda and related testimony of a Weyerhaeuser executive (TR 385) show that he and others were in direct communication with the co-conspirators regarding these and other competitively sensitive subjects.[38] Finally, the District Court made its own independent determination that a conspiracy was established

38. PX 182: Georgia-Pacific; PX 192: MacMillan Bloedel, Louisiana-Pacific, Kirby, Vancouver, Owens-Illinois, Temple Industries, Boise Cascade, Wilmar Plywood, International Paper, Dixon Plywood, Scotch Plywood, Georgia-Pacific, U. S. Plywood, Tremont, Union Camp; PX 193: Boise Cascade; PX 190: Willamette Industries, International Paper, Champion, Louisiana-Pacific; PX 189: Boise Cascade; PX 183: Kirby, Willamette, Georgia-Pacific, Louisiana-Pacific, Dixon Plywood, Scotch, MacMillan, Arkla, Union Camp; PX 180, 172, 179, 174, 177, 178: Georgia-Pacific. Other evidence of direct communication among competitors include PX 29 Georgia-Pacific and Boise Cascade; PX 31 Georgia-Pacific and Olinkraft, Owens-Illinois, Union Camp, McMillan Bloedel; PX 28 Georgia-Pacific and Owens-Illinois; PX 342 Georgia-Pacific and U. S. Plywood; PX 377 Kirby and U. S. Plywood; PX 397 Kirby and Georgia-Pacific; PX 189 Boise Cascade and Weyerhaeuser; PX 190 Weyerhaeuser and Willamette.

by the evidence and that Petitioners chose at trial not to dispute this evidence regarding absent co-conspirators (Pet. App. C-3).

CONCLUSION

For all of the foregoing reasons the Petition for A Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: March 29, 1982

APPENDIX A

Complete Instructions as to the Issues on Antitrust Law Given to the Jury by the Honorable Sam C. Pointer, Jr. on November 14, 1978

[Recess]

(3521) *

THE COURT: I will now be moving into the more specific instructions, but I do want to emphasize that these specific instructions are to be taken along with the general instructions, so that they are understood in context with each other, and that they are understood as a whole, and in their entirety.

The claims that Plaintiffs make in this case relate to two practices that were followed or utilized in the plywood industry. And you have heard much about those over the past month.

First, their complaint is about the practice of using west coast freight in pricing of southern pine plywood.

Second, the complaint is about the use of estimated or association or what I am going to call standard weights in the pricing of western fir plywood. I am going to use the term standard weights rather than associated weights, or estimated weights, or guaranteed weights. The parties have tended to

(3522)

emphasize one word more than the other, and I am simply going to use the word standard weights to refer to that same item. Namely, and you remember the evidence about the 1125, the 1525, and so on, for the different thicknesses. And so in this instruction, I am going to use the word standard weight, but I have reference to the same thing that the Plaintiffs say when they emphasize the word association weights, or when the Defendants emphasize the word estimated weights. Likewise, when I use the term west coast freight, I want to make it clear that I am neither adopting the position urged by the Plaintiffs, nor that of the Defendants.

* Page numbers in parentheses refer to page numbers of original transcript.

It is true and not in dispute in the trial of this case that there was used by the three Defendants here, and by other manufacturers in the plywood industry, a figure representing the freight from the West Coast—The Portland, Oregon area—to place of destination with respect to the pricing of southern pine plywood. Now whether one adopts the view of the Plaintiffs that that was a part of the price being charged for that southern pine plywood

(3523)

or adopts the position of the Defendants that that was a reference point or an element used for purposes of quoting and comparing prices, I am going to ultimately be leaving to you. I am simply going to say, I am going to use the phraseology, "West Coast freight" in these instructions without respect to agreeing with the positions urged by either of the two sides. I am simply referring to the practice of utilizing West Coast freight for either of these two methods, or forms, or uses. And that is what I have reference to when I get to some more details of it.

Now the Plaintiffs then are saying to each of these two practices, number one, that they were the result of a contract, combination or conspiracy between two or more of the manufacturers of plywood, and that this caused financial damage to the Plaintiffs and to the class members whom the Plaintiffs represent. Those are the two elements of the charge or charges that the Plaintiffs make. That these two practices, West Coast freight and standard weight, number one, were the result of a contract, combination, conspiracy

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between two or more manufacturers and number two, it caused financial damage to the purchasers of that plywood.

If the Plaintiffs are correct, if the Plaintiffs have carried their burden of proof on these two elements of their claims, then they are entitled to prevail in this litigation. If they have failed to carry their burden of proof as to either of these two elements, then as to that particular claim, they have not

met their burden of proof, and they are not entitled to prevail in this litigation.

(3525)

The Defendants acknowledged in the course of the trial of this case, as I understand the evidence and the arguments, that, yes, they and other manufacturers did use West Coast freight in the pricing of southern pine plywood. You have heard their explanations and statements and evidence as to how that was done and why it was done and for what purpose. They say, however, that that was not the result or the product of any contract, combination or conspiracy, and they say that in any event it had no effect, no financial damage. on the people who bought plywood.

So that puts into focus what the issues in this case are that you are going to be called upon to decide. Were these practices the result of contract, combination, conspiracy or not; were these practices such as caused damage, financial damage to the purchasers of plywood or not. Those are ultimately the questions you are going to be called upon to answer in your verdict.

To understand the first part, first

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element of the claims, that is as to whether these practices were the result of a contract, combination or conspiracy requires some understanding of the Sherman Antitrust Act, specifically Section 1 of that Act, because the Plaintiffs are saying in their charge that these were violations of that Act because they came out of contract, combination or conspiracy.

In 1890, the Congress of the United States passed this Sherman Antitrust Act, and one part of that Act, Section 1 contains provisions that the Plaintiffs say were violated here by the Defendants and by other manufacturers. That Act was passed by Congress for the purpose, among other purposes, of promoting free and open competition in the marketplace. Section 1 of the Act, however, perhaps unusually, does not require competition in any particular way, nor does it

even require competition at all. It operates rather in this way: It says that certain restrictions or limitations upon competition are illegal if they are the result of contract, combination or conspiracy. So that is why we

(3527)

have the issue in this case that you are being called upon to resolve by your verdict. Because the things, the West Coast freight, the use of standard weights, are violations—they are against the law—only if they were done as a result of contract, combination or conspiracy.

Now, let me go a little farther with that. A manufacturer on its own can decide to sell to some customers and not to others, to sell in some locations and not in others, can decide on its own to sell at one price to some customers or in some locations and at a different price to other customers or in other locations. It can on its own decide to charge actual freight or to charge or quote a freight item that is different from the actual freight. It can on its own decide to use actual weight of products in determining freight or to use some other measure as a weight factor in determining a freight charge. These things on its own it can do. In this case, a manufacturer of plywood on its own may decide to use West Coast freight in the pricing of southern pine plywood or may use standard weights in selling

(3528)

western fir plywood. These things it can do on its own. It may do so on its own lawfully under Section 1 of the Sherman Act even if other manufacturers are following the same or similar practices, and even if it knows the other manufacturers are following those practices. In and of itself, a manufacturer may on its own adopt practices that are followed and used by other people in the industry.

Now, what is unlawful and prohibited by section 1 of the Sherman Antitrust Act is for any two or more manufacturers to adopt any of these practices that I have given as illustration or to adopt West Coast freight or standard

weights by agreement with other manufacturers, that is to agree among manufacturers that they are going to use these matters in selling plywood to others. That is what is illegal. It is illegal if this agreement between two or more manufacturers comes about by—we go back to the statute—contract, combination or conspiracy.

Well, what is a contract? This is a term that is, of course, widely used and generally

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understood. A contract is an agreement between two or more persons to do or not to do something, a meeting of the minds of those persons or companies, with the understanding that they are bound or committed to do that which they have agreed to do or not to do that which they have agreed not to do. With a contract, the identity of the parties and the basic and essential terms are spelled out and agreed to. The contract may arise by express language, written or verbal, or a contract may arise by implication, that is by the conduct or course of dealings of the parties.

(3530)

The key thing however, with a contract is that there is this agreement between two or more persons to do or not to do that which they agreed upon.

If, for example, you were to find that there was a contract express or implied between two or more manufacturers to use west coast freight in their selling of plywood to others, or to use standard weights in their selling of plywood to others, that then would be a violation of Section One of the Sherman Act, one arising by contract. The Sherman Act however, is not limited to prohibiting those things which arise by contract, because it goes further and says, they are prohibited if they arise by combination or conspiracy. For our purposes, these two words, combination and conspiracy are equivalent, mean the same thing and from this point forward, I will just be talking about conspiracy, and for our purposes it includes the combination.

What is a conspiracy? A conspiracy is like a contract, but it is also somewhat different from a contract. Like a contract, a conspiracy

(3531)

requires there to be an agreement between two or more persons, or companies. That is, a meeting of the minds of two or more persons, or companies, upon some general plan or program.

Now, unlike a contract, it is not necessary in a conspiracy that the parties to that conspiracy know the identity of every other person who may be a party to it. It is necessary they know that there are some other people that are involved in it, but they don't have to know exactly who the parties to the conspiracy are. Likewise, to a conspiracy it is not necessary that the people who are parties to that agree on all the details. It is sufficient to show a conspiracy where there is an agreement on the general plan, leaving the details either to be worked out later or to actually be implemented by the persons who are parties to that conspiracy in their own way.

A conspiracy may be formed at the same time, that is, all the persons joining together at the same time and coming to their agreement at the same time, or a conspiracy may be formed over a period of time with the different persons joining

(3532)

that conspiracy in different ways, and at different points of time. A conspiracy may involve an agreement to do something new that hasn't been done before, or it may involve an agreement to do something which is already being done, either by one or both persons, or perhaps being done by others.

A conspiracy does not require particular formality that might normally be expected in contracts. A conspiracy may be express—that is, formed by words, whether written or oral—or a conspiracy may be formed tacitly—that is, understood, but not necessarily spoken or written. In other words, there can

be conduct that has meaning and understanding between the parties that produces ultimately as between those parties an agreement—an understanding that they are comitting one to the other to do some common action, although they may carry it out on their own, and at their own locations and in their own ways.

It is not necessary for there to be a

(3533)

conspiracy that it be shown that the persons who joined that conspiracy intended to violate the law, or knew that they were violating the law. In short, the motivation and the intention of the parties are not determinative whether there is or is not a conspiracy. It is required however, before there be a conspiracy that the persons, the parties to that, have knowingly and intentionally agreed, expressly or tacitly, to do those things that they are agreeing to do with one or more other person.

Now I want to digress a minute. I said both with respect to contracts and conspiracies that they involve an agreement between two or more persons or companies. The Defendants and other manufacturers of plywood are corporation, and a corporation only acts through the acts and conduct of its various employees, and officers, and agents. Now if it should be shown in this evidence that two or more individuals for the same company had some agreement dealing with West Coast freight, or use of standard weight, that would not be a conspiracy. That is, the agreement by two or more

(3534)

individuals for the same company is not a conspiracy at that point, because for there to be a conspiracy there must be two or more separate manufacturers who are agreeing to use in this case West Coast freight or standard weight in the sales by them to other persons of their plywood products. Likewise, if for example, there should be concluded that two or more divisions of the same company, such as two or more distribution centers for Georgia Pacific, had agreed among themselves to charge West Coast freight or standard weights to other

persons, that wouldn't be a conspiracy because, as I said earlier, a particular manufacturer may on its own come to a decision to use West Coast freight or standard weights or both, and that is not against the law. So the key here is whether two or more separate manufacturers did enter into a contract or conspiracy, however expressed, and whatever form, involving the use of West Coast freight or standard weights in the sales of plywood to others.

What I have said, by way of a summary, is that a conspiracy, no less than a contract requires

(3535)

an agreement, a joinder in some common activity or plan. That agreement—voluntary and intentional agreement—is critical to the establishment of a conspiracy just as it would be to the establishment of a contract. What is unimportant in looking and deciding whether there is a conspiracy is how that agreement might have been formed; whether it would have been done at a particular point in time, or over a period of time, the details of how that was to be carried out and whether it was done formally or informally by words or by conduct.

(3536)

Now, there are some items of evidence that I want to comment upon because, in your decision as to whether or not there was a conspiracy or contract here calling for these practices, you will be looking at both direct evidence and circumstantial evidence. I have already explained earlier both what circumstantial is and how both circumstantial and direct evidence may be and are due to be considered by you in making your decision. I want to talk for a few minutes about some of the evidence in the case that may have some bearing on this decision of yours. I do so primarily for illustration and to give some greater understanding, perhaps, as to how that might relate to your decision.

There has been evidence of manufacturers talking with one another, obtaining pricing information from one another, buying from one another, including long term contracts. These

practices, these transactions, these contacts in and of themselves are not illegal. Indeed, they may be vehicles for fostering competition. At the

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same time, such matters may also be conduct that, when viewed on their own and in the light of the other evidence, indicate that there were agreements, express or implied, reached between manufacturers that they would use in selling plywood to others West Coast freight or standard weights. In short, although you should understand that, when one manufacturer buys from another that is a contract, that contract in and of itself is not a violation of the Sherman Antitrust Law unless that contract involves and places a requirement that there will be in the resale of that product the use of West Coast freight or standard weights.

Now, the fact that manufacturers attended trade meetings, participated in trade discussions, likewise, in and of itself is not illegal under the Sherman Antitrust Act and, indeed, may be evidenced of or a means for fostering competition. On the other hand, such evidence is evidence that there was some opportunity for persons to have agreed or to have gotten together to assure that some previously agreed upon matter was being

(3538)

carried out. I, of course, would call to your attention that the mere fact that there be opportunity to meet or to agree does not mean that any particular agreement was or was not entered. It is merely one part of the total of the circumstantial evidence that you will be dealing with.

For example, it has been shown that the Plaintiffs, or some of the Plaintiffs in this area, were members of a trade association themselves, and there, as I say, going back to the question about the Defendants, is nothing illegal at all about that. There is nothing wrong in and of itself with either trade association or with going to trade meetings, but it is part of the facts, the circumstantial evidence, which you are

going to be called upon to consider to make the decisions you are.

Now, there is evidence that plywood prices fluctuate, perhaps widely, and that there was competition among manufacturers in the selling of plywood. Now, those matters, if they be true, would not in and of themselves mean that there

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was no contract or conspiracy to use West Coast freight or standard weights. There is nothing that says a conspiracy, for example, to restrain competition must restrain all competition. If there is a conspiracy to restrain certain aspects of competition, that is still against the law, against Section 1 of the Sherman Antitrust Act. On the other hand, evidence of competition in other areas is a part of the circumstantial evidence that you will be considering in considering whether nevertheless, they would have agreed to have established a particular form of price or to use particular restraints on competition. It will be a part of the total evidence in the case.

As I have indicated earlier, the fact that many or all manufacturers were to adopt the same or similar practices would not in and of itself mean that there was a conspiracy to do so. This would be true even if it were shown that they did so knowing that others were following similar practices. On the other hand, where it be a fact that similar practices are being

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followed by many manufacturers, with each being aware that the other is doing so, that is a part of the circumstantial evidence from which a jury may, with other evidence in the case, look to see whether this way was so because of some agreement to do so.

In considering whether or not to draw any such inference, you would want to consider whether the different manufacturers adopting such practices were doing so because of their own independent-best judgment as to what was in their economic interest to do so, independent of any commitment

or agreement from other people to do the same thing. In deciding this issue and in deciding what inference, if any, to draw, you would want to consider whether the practices that were being employed made sense in the light of the economic industry conditions and whether or not the benefits from those practices, continuation of those practices, were or were not dependent on other people and other manufacturers doing the same thing. You would want to consider whether those practices

(3541)

were, on the one hand, arbitrary and artificial and unduly complicated or, on the other hand, were helpful and useful and convenient.

Now, the mere fact, if it be a fact, that some practice was being—followed that was artificial or arbitrary or unduly complicated, that fact in and of itself would not mean that it was a product of a conspiracy any more than would the fact, if it be a fact that the practices were logical and convenient and helpful would indicate that there wasn't a conspiracy. These would simply be factors that you would take into consideration in the totality of the evidence in deciding whether or not to draw the inference that these matters came about—not as a result of decision by the individual companies that it was in their best interest to do so, but whether they did so because of some express or implied commitment and agreement from others to do likewise.

I do call your attention to the fact that you are not called into this case to pass judgment on whether the practices of the manufacturers were

(3542)

wise practices or were fair practices. That is not what you are called upon to decide. You might conclude that they were or they weren't. What you are called upon to do is to decide whether these practices were or were not the product of contract, combination or conspiracy as I have defined that.

I am going to pass out at this time, have the Clerk pass out among you, the type of verdict form that you will be returning so that I can go down this and explain what it means and because I think it will be helpful both in understanding these instructions about the contract or conspiracy and in understanding the balance of the instructions.

(3543)

You might just take a moment to see what this is. It is two pages of questions. It might look complicated to begin with, but it really isn't, and we are going to go down this in a minute, and you don't really need to read all of it, because we will go down and read it.

You will notice there are basically four questions, and some of them have sub-parts. For the most part you will be asked to respond by indicating yes or no with some qualificasions that I will get to.

If you look at question 1 or 1(a) you find this, "Was the use of west coast freight in the pricing of southern pine plywood during the period from February 23, 1968 to December 31, 1973, the result of a conspiracy between two or more manufacturers of softwood plywood?" Out to the right there is blank line where you would answer, yes or no.

The Plaintiffs are asking that you return a response of yes to this question. The Defendants are asking that you return a response of no to this question. And the Plaintiffs have the burden of proof

(3544)

in terms of satisfying you that a yes answer to this question would represent the more probable truth of the matter than would a no answer indicate.

If you turn to the next page, to question 3(a), you will see this question, "Was the use of standard weights in the pricing of western fir plywood during the period from February 23, 1968 to December 31, 1973, the result of a conspiracy between two or more manufacturers of softwood plywood?" And again out to the right, a position for answering

yes and no. And against the Plaintiffs would ask, and would have the burden of proof with respect to a yes answer, and the Defendants say that you should answer no to that question.

I have indicated that the Plaintiffs must establish that the use of these two items, west coast freight and what I have called standard weights, was the result of a contract, combination, conspiracy. And the question that is before you only uses the word conspiracy. However, I want you to understand that that word there is a shorthand way of also asking "contract, combination or conspiracy in the way I have already described it.

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I simply eliminated those words to try to make the question a little bit more straightforward.

The period of time may raise questions for you. As was indicated during the arguments, the first lawsuit of this series was filed on February 23, 1972, and, under the law, the maximum period of time that people may make a complaint of this sort is for the four years immediately preceeding the filing of the lawsuit. So this February 23, 1968, represents the date that would be four years prior to the filing of the first lawsuit.

You have heard the arguments in which the Plaintiffs say that the conspiracy that they say existed, occurred and began long before this. But since their claim in this case under the law is limited to the period from and after February 23, 1968, there is no requirement of you that you, specify, if you find such a conspiracy existed, as to when earlier than that it existed. The Plaintiffs say in any event it existed on that day, and that is all that was required in terms of answering this question.

(3546)

Insofar as the closing date is specified here, you have heard the Plaintiffs argument to the effect that they may have some claims or might have claims that the conspiracy continued after that date. They closed their claim so to speak in this case by saying did it at least go through that date, December 31, 1973?

Now the same question of dates then applies both to the matter of the use of West Coast freight and to the use of standard weights. And in these questions, you will notice it does not depend upon how those items were used, that it, it is not a question of whether at this point west coast freight was used merely to compare prices, or was used as a way of providing a price that would be paid by the purchasers. You don't have to make that decision in answering question number 1, or question number 3 with respect to standard weights. What you have to decide on question 1(a) and question 3(a), is whether the use of those in the total pricing picture, however the actual use turned out to be, whether that was the product of contract,

(3548)

combination or conspiracy, and whether it existed during that period of time? Now if you answer that question or those questions yes, you would then look to 1(b), and a similar question 3(b). That is, you would then be asked to say what under the evidence were the companies that were parties to that conspiracy—that contract, combination or conspiracy. Was Georgia Pacific Corporation a party to such contract, combination or conspiracy? And you would answer yes or no. And the burden is on the Plaintiff to reasonably satisfy you, not only that there was a contract, combination or conspiracy between two or more manufacturers, but that Georgia Pacific was a party to that. And they are entitled to special consideration as to their case, even if you determine that there was between some manufacturers, such a contract, combination or conspiracy.

Obviously, the Plaintiffs ask that you give a yes answer. The Defendant, Georgia Pacific, ask that you give a no answer to that specific question.

You have similar questions then dealing

(3549)

with Weyerhaeuser. If you found such a contract, combination, conspiracy, was Weyerhaeuser Company a party to that?

Yes or no. Was Williamette Industries, a party to that? Yes, or no. Those are the only three Defendants we have here.

However, if you have answered that there was such a conspiracy between two or more manufacturers, because of the further proceedings that will be required in the case, we ask that you go further than that, and tell us whether there were other manufacturers besides these three Defendants who were involved, or were parties to that combination, contract or conspiracy. Were all of the manufacturers of plywood? If everybody, if you would find all manufacturers, not just the three Defendants, or any of the three Defendants were, but everybody else was, then you would answer yes to that question, all of the manufacturers of softwood plywood.

If you were to conclude that one of the three or two of the three Defendants were not parties, but that one or two were parties to such a conspiracy, you would indicate which one or two

(3550)

were. You would indicate which one or two were not. And you would still go forward and indicate whether the other companies, not the Defendants here, were parties to that conspiracy.

If you were to conclude that yes, there were some other manufacturers apart from these three Defendants, or any of them that you might find are such parties who were parties to that conspiracy, then we ask that you answer that question coming on down, yes, to the question, some of the manufacturers of softwood plywood, and identify what companies those were.

You might, for example, and I am not suggesting, and I hope it doesn't sound like I am suggesting what your answer to any of these questions should be, or that you should go down to this point, but if you are down to this point in answering, you might conclude that as to question 1(b) down here, that yes, the other people who manufactured southern pine plywood were parties to such a conspiracy, but the people who

only manufactured western pine plywood were not so, you could simply answer in that form when

(3551)

you came down that they were other manufacturers of southern pine plywood, or if you were to conclude there were just specific companies rather than a category, you could identify those by name.

Now you have the similar type question then is being asked on 3(b). And if you decide that the use of standard weights was the result of the contract, combination, conspiracy, then you would be asked to answer and describe who it was that were parties to that.

If you answer 1(a), no, you don't have to answer any of 1(b). Because 1(b) only relates to identifying people who were parties to a conspiracy, and if you find there wasn't one, obviously there would be no point in going forward with 1(b). Likewise on question 3, if you were to answer 3(a), no, you don't go forward to answer 3(b), because you would have found that there wasn't such a contract, combination or conspiracy.

(3552)

Now, you will note that there are questions 2 and 4, and I haven't gone into those yet, nor have I really touched upon them in these instructions. I started off this second part of the instructions by saying that there are two elements in the claims that the Plaintiffs make against the Defendants and that they have a burden of proving each of the elements to your reasonable satisfaction. Because they must not only prove that West Coast freight and standard weights, were a result of a contract, combination or conspiracy but they must also prove to your reasonable satisfaction that these practices had a financial damage, caused financial damages to the people that bought plywood, the Plaintiffs and the other class members. Now, the Plaintiffs obviously are asking and insisting that you answer yes to questions 2(a) and 4(a). The Defendants are saying that you should answer no to those questions, that the Plaintiffs have not proved that, and that your decision then ought to be no.

The questions I think are easy to under-

(3553)

stand and really don't require that much explanation. 2(a), did the use of West Coast freight in the pricing of southern pine plywood during the period from February 23, 1968 to December 31, 1973 cause financial damage to the purchasers of such plywood? answering either yes or no.

You have a similar question on 4(a). It asks the same question but with respect to the use of standard weights, as to whether the use of standard weights during that period of time caused financial damage to the people buying western fir plywood.

Now, and again, the Plaintiffs in asking that you answer that yes has a burden to persuade you to answer yes to that. The Defendants are asking you to answer no to that. If you conclude that, yes, the use of southern—of West Coast freight or of standard weights or both did cause damage to the people who brought southern pine plywood and western fir plywood respectively, you are then asked to go on to these questions 2(b) and 4(b), and that is to say whether the damage that was caused to the purchasers is, as

(3554)

the Plaintiffs contend in the case of West Coast freight, the difference between the West Coast freight and the actual freight. Plaintiffs are saying that in the pricing of southern pine plywood that there was damage caused to people who bought that southern pine plywood to the extent of the difference between the West Coast freight and the actual freight.

Now, actually you will remember that there is some evidence in the case that not in all cases was the manufacturer involved in the shipping of the plywood to a particular purchaser's destination but that on some of those that there was an actual pickup in some way by the purchaser at the mill site, for example, or the purchaser arranged for his own transportation, and that in those situations there was some allowance given off of the price for picking it up rather than the man-

ufacturer paying the freight charges. Now, in those situations the Plaintiffs would say that the actual damage caused was the difference between the West Coast freight and this allowance that was given as a

(3555)

deduction against the price.

So in question 2(b), if you have answered 2(a) yes, you are to go on forward and say whether the Plaintiffs are correct in their contention that the amount of damage that was sustained by purchasers was equal to the difference between the West Coast freight and the actual freight or the allowance given for picking up or handling their own freight. The Plaintiffs are asking that you answer yes to that question. The Defendants are saying that—of course they are saying you shouldn't have to get to that question at all, but they are also saying answer no if you do get to that question.

4(b) is of a similar form; that is, it is saying that if you have decided that there was damage caused by the use of standard weights, damage to the purchasers of western pine plywood, then was that damage equal to the amount by which freight calculated on the basis of the standard weight or estimated weight or association weight, whatever you want to call it, exceeded the freight that was actually paid. The Plaintiffs say that

(3556)

is the amount by which the purchasers of western pine plywood were damaged, the difference between a freight calculation based on these estimated or standard or association weights and, on the other hand, the actual freight incurred. Here again, the Plaintiffs ask that you answer yes to that, and the Defendants say, Number One, that you shouldn't have to get to that point but if you do you should answer no.

Now, you are being asked then to render a verdict, to say what the facts are as shown by the evidence, by giving us answers to these various questions under the instructions that I have given you. As indicated, the Plaintiffs have the burden

of proof as to the yes answer which is what they are asking for to these various questions. We can only accept a verdict that is unanimous. We do not go in our system with majority vote.

It is to be expected that when you go into the jury room you will find that there are some disagreements among yourselves. There will be differences in recollection that you have as to

(3557)

the evidence that has been presented. There will be differences probably in the way you have interpreted and emphasized and given importance to various aspects of the evidence. There may be differences in recollection and understanding about these instructions that I have given.

When you go into the jury room, you are expected to share these differences, if any, these disagreements, if any, in the process of arriving at that one verdict with which you all conscientiously agree.

* * *

(3591)

The Court: I have this note signed by Mr. Guidry as foreman.

(3592)

Would you please elaborate further on conspiracy?

First of all, let me comment that in giving these supplemental or additional instructions, you should bear in mind that they are to be taken in context with the remainder and other instructions already given. And you should not isolate them out of context from those other instructions.

Obviously I am not going to repeat, however, the entire series of instructions, but I do want to emphasize that you should keep those in mind at all times in talking about a particular aspect of the case.

First of all, I want to make it clear that in the verdict form, when you're asked in question 1(a) and 3(a), whether particular practices there listed were the product of a conspiracy between two or more manufacturers you do bear in mind that the term

conspiracy as used in those questions was intended to include the broader statement of contract, combination or conspiracy, as I have earlier described those terms to you. Contract being essentially an agreement between

(3593)

two or more persons to do or not to do something where the parties are identified and where the essential details of what is to be done or not to be done are spelled out. Contracts being either expressed by words, written or oral, or created by conduct or course of dealings between the parties.

I went on to describe that a conspiracy is much like a contract, and in that sense conspiracy and combination, the words used in the statute, are to be taken as assentially equivalent, meaning the same thing.

The essence of a conspiracy is that there be an agreement between two or more, in this case companies, to do something or not to do something. In this particular case, the question is whether there was an agreement by two or more manufacturers to use West Coast freight in the sale or pricing of southern pine plywood; or whether there was an agreement between two or more manufacturers to use standard weights in the pricing of western fir plywood.

In connection with the word or term

(3594)

"conspiracy", then we bear in mind this, that we are talking about an agreement, a meeting of the minds between two or more companies agreeing to some common plan or purpose or design that they are in a sense committing to carry out.

The mechanics or techniques by which a conspiracy might arise might vary. There could be a conspiracy formed by representatives of two companies sitting down and agreeing, for example, to use West Coast freight in selling of southern pine plywood to others. That would be one way a conspiracy could arise, by people actually sitting down and agreeing to do that.

A conspiracy may arise, that is, it may be established by evidence that indicates that there was a certain conduct of action between the parties that carried the message of agreement, common undertaking and common commitment to carry out the plan, the design or the goal. And a conspiracy is not necessary that it be established that all the details of any such plan were agreed to.

In a conspiracy it may be that only broad

(3595)

objectives or ideas or plans were agreed to, and that details of how that would be carried out would be determined later or would be determined by the parties to that conspiracy, operating on their own and in their own ways.

A conspiracy may be formed without knowing the identity of each and every other person who joins that conspiracy, although it is necessary for people to know before there can be a conspiracy that there are others who are embarking and committing themselves on that same common task or goal or purpose.

Conspiracies may be formed over time, with different persons or companies joining at different times and in different ways.

A conspiracy may be formed by two or more companies agreeing to do something totally new that has not gone on before.

A conspiracy may be formed, on the other hand, by agreeing to continue or to adopt a practice that has previously existed, though existing only by the individual decision prior to that time of the particular companies.

(3596)

A conspiracy may be established by direct evidence or by circumstantial evidence or both. And if you recall, I went over certain aspects of evidence, and those were not intended to be the only ones that you were to consider, but whenever certain aspects of evidence as to how that might affect your conclusions as to whether there was or wasn't an agreement between two

or more companies to charge West Coast freight or to use standard weights in the sale of plywood to others.

You recall that I noted for you that a contract of sale between one manufacturer and another, although a contract is not a contract that is prohibited in and of itself by this Sherman Antitrust Act, unless, that is, there is in that contract an agreement that in selling the plywood to others there will be the use of West Coast freight or the use of standard weights.

The essence, then, of a conspiracy is an agreement, whether expressed in words or by conduct, a commitment of one company to another to engage in some common practice, though with the details perhaps being left to be worked out, to be

(3597)

implemented by each company acting on its own.

You recall that I indicated that the fact that two companies do the same thing or follow the same practices, in and of itself is not wrong. It may, however, when considered in the light of other evidence presented, be evidence that this was done as the result of or in furtherance of a conspiracy. And I recounted some aspects of evidence that you would want to consider in deciding that.

Again, coming back to the core of the product which is not simply whether the practices were the same or similar, but whether there was an agreement or tacit understanding that those companies commit themselves to have that type of conduct and activity.

I am not sure what else I can say to you in terms of explaining the concept and the principles of a conspiracy, what it is and what it isn't.

I do remind you that it is the burden on the plaintiffs to establish to your reasonable satisfaction that the two practices complained of

(3598)

and identified in question 1(a) and 3(a), were the product of a conspiracy with for that purpose would be contract, combination or conspiracy between two or more manufacturers,

and that that burden is upon the plaintiffs. But being a civil case, the question is, whether they have established that to your reasonable satisfaction under these principles of law.

I believe with that explanation, I will ask that you resume your deliberations. If it should be that I have perhaps not covered the area that was troubling you most, and you need some further clarification, I think it might be helpful to be a little bit more specific in the kind of question that was asked, so I could respond to it perhaps more directly.

If you would then resume your deliberations.

I do ask this, before you actually resume your deliberations, that you take, once you get to the jury room, two or three minutes to sort of wait and hesitate and let me find out if the attorneys think I need to correct or clarify something

(3599)

in these supplemental instructions before you actually resume your deliberations.

If you would then wait in the jury room, and the marshal will indicate by a knock or sound on the door that you can resume.

* * *

APPENDIX B

Statement of the Issues From the Joint Brief of Petitioners Filed in the United States Court of Appeals for the Fifth Circuit August 13, 1980.

STATEMENT OF THE ISSUES.

1. May a jury infer conspiracy when:
   (a) the conspiracies alleged themselves are so irrational they could not have existed,
   (b) there was no direct evidence—not a single witness or document—of the existence of conspiracies which would have produced such massive evidence if they had existed,
   (c) the circumstantial evidence showed only legitimate business contacts and dealings,
   (d) no arbitrary parallel behavior from which an inference of conspiracy might be drawn was shown, and
   (e) the record affirmatively shows vigorous competition, volatile prices, sellers undercutting one another, and buyers who unanimously testified that the forms of quotation allegedly implementing the conspiracies had no effect on prices?
2. May a trial judge properly:
   (a) give instructions on legal theories that have no evidentiary support,
   (b) instruct that normal commercial contracts and meetings may be taken as evidence of conspiracy, and
   (c) admit material that gave the jury the wholly false impression that the government had convicted the defendants of the very conspiracies alleged here?
3. Was the jury's finding of impact supported by any evidence?

4. (a) May the trial judge in a class action refuse to give the instruction required by *State of Alabama* v. *Blue Bird Body Co., Inc.* that the jury must determine that *each* member of the class was injured, and

   (b) is a jury verdict valid that did not so determine?

5. May a trial judge submit the measure of damages to the jury after the close of evidence, having previously reserved that issue for a later trial?

6. May a trial judge, in a class action, submit a measure of damages to the jury which creates irreconcilable conflicts of interest among members of the class and which had earlier been ruled out of the case?

7. Was it proper to certify this action as a class action?

8. May a jury in a price-fixing case adopt a measure of damages that is wholly unrelated to the difference between the supposedly fixed prices and the prices that would have prevailed in a free market?

9. Does the Sherman Act require sellers with different costs to price at a cost plus a "reasonable" profit rather than at market price?

10. (No. 80-3235; No. 80-3236) In the supplement at the conclusion of this brief, defendants-appellants Georgia-Pacific and Willamette present the further issue of whether the court's discovery sanctions, imposed despite explicit findings of defendants' good faith, exceeded the court's discretion and the Federal Rules of Civil Procedure.

Supplemental Brief

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Nos. 81-1618 and 81-1619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WEYERHAEUSER COMPANY and
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vs.

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GEORGIA-PACIFIC CORPORATION,
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vs.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Supplemental Brief of Respondents in Opposition to Petition for Writ of Certiorari

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Supplemental Brief of Respondents in Opposition to Petition for Writ of Certiorari

Respondents file this Supplemental Brief to correct an error in *Georgia-Pacific Corporation's Reply Brief in Support of Petition for Writ of Certiorari,* wherein Petitioner claims that Respondents have "resorted to numerous mischaracterizations and misstatements of the record." *Reply Brief* at p. 7 n. 9.

The basis of Petitioner's sweeping charge is that Respondents' transcript citations do not support the following statement:

> "Even though Weyerhaeuser and Georgia-Pacific had no legitimate business dealing together, and did not buy from or sell plywood to each other (TR 310-12, 341, 451, 574, 581-82, 923-24) . . . ."

By the careful use of "inter alia", Petitioner has quoted out of context from two lines on TR 341 and 451, and ignored the other citations entirely.

At TR 574, one of the ignored citations, James G. Harries, who worked for Georgia-Pacific for 11 years, and *who was in charge of outside purchases of southern pine plywood,* was asked whether he had purchased from Weyerhaeuser. He answered "No; He didn't . . ."

His testimony continued:

> "Q. You indicated that at least in terms of your purchases for the company during the period, I guess, '66 through '73 or thereabout, you made no purchases from Weyerhaeuser.
>
> A. Not of southern pine plywood, no." TR 581.

Georgia-Pacific's Mr. Nash at TR 923-24 similarly described the purchases from Weyerhaeuser as only "a couple" "very infrequently", which purchasing Georgia-Pacific "gave up" entirely.

Petitioner quotes two lines out of context from the testimony of Weyerhaeuser's marketing employee, Mr. Tweedie, who admittedly had no responsibility for purchasing, and no knowledge of Weyerhaeuser purchases from Georgia-Pacific:

"Q. Are you familiar with a contract between Weyerhaeuser and Georgia Pacific or Weyerhaeuser to buy plywood from Georgia Pacific?

A. I am not, no.

Q. Do you have any knowledge at all—

A. No.

Q. —that Weyerhaeuser bought plywood from Georgia Pacific?

A. No, no knowledge.

* * *

Q. Were you involved in Weyerhaeuser selling plywood to Georgia Pacific on any basis?

A. No." TR 450,451.

Respondent has pointed to one of the many conflicts in the evidence, the resolution of which was particularly for the jury.[1] The "mischaracterization" is nothing more than the conflict between different portions of Mr. Tweedie's own testimony, and the conflict between his testimony and that of the other of Petitioners' employees.

Petitioner's reply briefs demonstrate that factual rather than legal issues are controlling here. The jury's finding in favor of respondents requires that conflicts in the evidence be resolved in respondents' favor. *Continental Ore v. United Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962). Since the weight and sufficiency of the evidence has been considered at length by the jury and two courts, further review here is not warranted.

This is not a "watershed case for federal antitrust law" (Pet. Wey. Rep. p. 1), and does not present "clear and fundamental issues of antitrust law" (Pet. G.P. Rep. p. 1).

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1. Similarly, Weyerhaeuser and Williamette at footnote 3 of their *Reply Brief* urge a different characterization of the evidence upon this Court.

Respondents respectfully submit that the issue raised by Petitioners is substantially similar to that presented in *United States v. Cargo Service Stations, Inc.*, 657 F.2d 676 (5th Cir. 1981), *cert. den., Cargo Gas Co. v. U.S.*, No. 81-1223, 50 U.S.L.W. 3765 (March 22, 1982).

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Petitioner's Reply Brief

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Fifth Circuit

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On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION

This is a watershed case in federal antitrust law. It is the first national class action litigated to judgment, the stakes are enormous, and the issues are important to sound conspiracy and damage theory. The case is being widely followed by the business community, the bar, and the financial and general press.

In an unprecedented step, the Business Roundtable, the Chamber of Commerce, and the National Association of Manufacturers—representing the broadest cross-section of industrial and commercial enterprise in the nation—have all urged this Court to grant certiorari. Several plaintiff class members have even taken the extraordinary step of filing a separate brief supporting review.

The consistent theme of the *amici* is that the conflicting results reached by the Fifth and Ninth Circuits are not merely irreconcilable, but incomprehensible to those who must comply with the proscriptions of the antitrust laws. The briefs emphasize—as have these petitioners—that the

conspiracy and damage rules applied by the Fifth Circuit are incompatible with sound legal and economic principles.

Desperate to avoid the significant questions presented for review, respondents have been compelled to refashion for this Court a case that was neither tried nor submitted to the jury. In a revealing volte-face, respondents urge a conspiracy theory that the jury never adopted, argue an impact on plywood prices that respondents and their expert did not present at trial, and repudiate the parallel FTC proceedings that they themselves paraded before the jury as of critical significance.

1. The jury found a conspiracy regarding freight and weights, not delivered plywood prices.

Respondents (like the FTC's staff before them) tried their case on the theory that petitioners had conspired to use West Coast freight and standardized weights. In neither opening statement nor closing argument did respondents' counsel charge the existence of a conspiracy to fix delivered plywood prices. To the contrary, counsel stressed on both occasions "that the case can really be quite simply stated" as a conspiracy "to fix *certain elements of price.*" (Vol. 56, Tr. 3233-34; Vol. 45, Tr. 78-80, 87-88)[1] Any broader contention would, in fact, have run counter to the uncontradicted evidence that there was intense competition regarding delivered prices. (Pet. 4)

Respondents misrepresent the record when they claim there was a "jury finding" that "the Petitioners engaged in an unlawful conspiracy to fix the price of plywood," and that this encompassed "the whole price of the product." (Resp.Br. 5) The *only* issue put to or found by the jury was:

> "Was the use of 'West Coast freight' in the pricing of Southern pine plywood during the period from February 23, 1968 to December 31, 1973 the result of a con-

[1] Except where otherwise stated, emphasis has been added throughout this brief.

spiracy between two or more manufacturers of softwood plywood?" (Special Verdict, Pet. App. I-1)[2]

Similarly, the judgment order makes no mention of delivered prices; it recites only that petitioners were "parties to a conspiracy . . . in using 'West Coast freight' in the pricing of Southern pine plywood . . . [and] in using 'standard weights' in the pricing of Western fir plywood . . . ." (Pet. App. C-1)

Once attention is focused on the freight/weight conspiracy found by the jury, the fatal legal errors below are exposed. *First*, there is no "direct evidence" (Resp. Br. 5) to support the supposed conspiracy, only petitioners' parallel method of quoting freight and weight, plus some inter-company contacts affording an opportunity for, but no proof of, conspiracy. *Second*, the case is seen to be a "single element" price-fixing case in which no consideration was given to whether the use of a standardized freight and weight factor had any impact on the ultimate price paid by plywood buyers. We turn briefly to each of these errors.

2. There was no "direct evidence" of a freight or weight conspiracy, only evidence of parallel conduct and "opportunity contacts."

Since the Petition was filed, still another Circuit has aligned itself against the decision below on what evidence is sufficient to support a conspiracy finding. *Proctor* v. *State Farm Mut. Automobile Ins. Co.*, No. 80-2437 (D.C. Cir. March 16, 1982) (Slip. Op.). The case is strikingly similar on its facts. Plaintiffs claimed the defendant insurance companies had agreed to "*a common formula* for reimbursing their insureds for the cost of automobile damage repair work," and to "standardized estimates of the time necessary to complete repair work." (*Id.* at 4) Plaintiffs also "purport[ed] to have offered direct evidence" of defendants' conspiracy in the form of documents allegedly memorializing "meetings in which they agreed to a common formula to be used in the

[2] A parallel question was asked concerning "the use of 'standard weights' in the pricing of Western fir plywood." (Pet. App. I-2)

adjusting and settling of automobile damage repair claims," as well as other matters. (*Id.* at 38-40)

The D.C. Circuit found that this supposed "direct evidence," like the "direct evidence" here, consisted either of inter-firm discussions of *other matters* or documents that "suggest, *at most*, parallel business behavior which would be in the economic self-interest of each appellee." (*Id.* at 44-45, 53; emphasis in original) In affirming summary judgment for the insurance companies, the D.C. Circuit adopted the rule followed by the Third, Seventh and Ninth Circuits, and urged by petitioners:

> "Only when the observed parallel behavior is inconsistent with the behavior to be expected from each actor individually pursuing its own economic interest may an agreement be inferred from the parallel conduct." (*Id.* at 38)

The Fifth Circuit decision, by contrast, allowed a conspiracy to be inferred merely from parallel conduct plus "communication between high-level personnel on pricing policy," with no requirement that the conduct be inconsistent with each firm's self interest. (655 F.2d at 634, Pet. App. A-9) Petitioners have already shown how this over-broad rule misled the Fifth Circuit into reliance on six "damaging" memoranda that are not damaging at all—either because they never mention the use of West Coast freight or standardized weights, or because they involve legitimate reports on past activities of competitors. (Pet. 14-15)

The other "direct evidence" now advanced to support respondents' case is equally chimerical. Their opening example sets the pattern. They claim a Georgia-Pacific officer "testified that the manufacturers shipped plywood using the 'agreed on' association weights." (Resp. Br. 7-8, citing Vol. 47, Tr. 569) This is not candid. On the immediately preceding pages, the witness explained that what he meant by "agreed on" weights was that, when price controls were imposed in the 1940's, "the manufacturers were approached

by, I believe, an agency of the government—again this is just what I was told—to establish a so-called uniform weight for each thickness of the plywood, so every manufacturer would be shipping on the same weights." (Vol. 47, Tr. 567)[3]

There was, in short, no "direct evidence" of a West Coast freight conspiracy—only "opportunity contacts." Respondents both miss the point and misstate the record in arguing that the instructions stated that opportunity contacts were insufficient to support an inference of conspiracy. (Resp. Br. 7) The instructions stated that opportunity contacts may, "when viewed on their own and in light of the other evidence, indicate that there were agreements" to use West Coast freight. (Resp. App. A-9) Even if this language were read (contrary to its clear import) to require additional evidence beyond opportunity contacts, the error was in failing to charge that parallel conduct could be treated as the

[3]The four other instances where one petitioner supposedly "agreed" with or was "assured" by another regarding weights or freight (Resp. Br. 8-9) are similarly fanciful. PX 10 does not "document" a conversation in which "Weyerhaeuser *assured* Georgia-Pacific that it was not shifting to 'an FOB mill pricing policy.'" (Resp. Br. 8) It is simply an internal Georgia-Pacific memorandum dispelling a rumor that such a shift had occurred, and reflects no "assurance" of what will occur in the future. Similarly, in PX 182 Weyerhaeuser was not "*assured* by Georgia-Pacific that it would 'resist all possible sales' of southern plywood in New England due to poor 'freight return.'" (Resp. Br. 8) PX 182 merely records a statement by Georgia-Pacific that it tries to avoid shipping to unprofitable areas. Weyerhaeuser did not agree with Willamette in PX 748 that "it would not *sell* southern plywood in areas where freight gain would be reduced." (Resp. Br. 9) PX 748 is simply a routine contract under which Weyerhaeuser agreed to *buy* plywood from Willamette, and specifies the areas for shipment. Finally, PX 180 certainly does not show that Weyerhaeuser and Georgia-Pacific "*agreed* that these two companies would keep in 'direct contact' through 'weekly phone conversations' to 'secure specific competitive information.'" (Resp. Br. 9) It only reflects a Weyerhaeuser employee's *unilateral* intent to try to secure competitive intelligence from two Georgia-Pacific employees he had recently met.

requisite "other evidence" absent proof that the conduct would have been against each firm's independent self interest.

3. Damages were based on the freight element without regard to any impact on total delivered prices.

Concentrating on the West Coast freight conspiracy found by the jury—rather than the spurious delivered price conspiracy now advanced by respondents—also points up the deficiencies in the measure of damages suggested by the trial court, adopted by the jury and approved by the Fifth Circuit. The jury was never instructed on the established law that antitrust damages are measured by the difference between the price actually paid for the product (here plywood, not freight) and the price that would have been paid in a competitive market. The jury's attention was directed solely to the freight element, and it was never instructed to consider whether any increases in that element were offset by adjustments in other aspects of the price. In particular, did the use of West Coast freight lead to the use of correspondingly lower mill prices, as the Ninth Circuit concluded? (637 F.2d at 580, Pet. App. J-14)

Respondents try to cover this critical shortcoming with the claim that the trial court "expressly charged" the jury to consider whether the use of West Coast freight "raised the price of southern plywood (App. A, Tr. 3522-23) and if so whether it raised the price by the amount of the charges for non-existent freight. App. A, Tr. 3553-56." (Resp. Br. 10) The cited instructions tell quite a different story. The first advised the jury of respondents' position at trial that West Coast freight was merely "*part of the price* being charged for that southern pine plywood." (Vol. 56, Tr. 3522) The second was only the trial court's introduction to its leading interrogatories on the damage measure. (*Id.* at 3553-56).

In the latter regard, whether the use of West Coast freight "raised the price by the amount of the charges for non-existent freight" was a determination that could be made

only by comparing the delivered price as affected by the use of West Coast freight with the delivered price that otherwise would have existed. Nowhere in the trial court's instructions was the jury told that this was its task. It was told only that respondents wanted "yes" answers and petitioners wanted "no" answers to the leading interrogatories drafted *sua sponte* by the Court.[4]

Respondents fare no better in their argument that this Court's *Catalano* decision forbids the "assumption" that the freight differential was completely offset by adjustments to mill prices. (Resp. Br. 11-12, *citing Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1981)) Petitioners do not contend that a jury must "assume" such an offset. Rather, the jury must be instructed that it cannot find damage in a *Catalano*-type price fixing case unless it finds that the total price *actually paid* by the plaintiff exceeded the total price plaintiff *would have paid* absent the alleged conspiracy. *Catalano* itself supports this, and it is a fundamental legal point that will be of enhanced importance since that case. (Pet. 20)

Respondents' expert never even sought to address this issue, let alone to provide support for respondents' measure of damages. He disavowed any concern with the mill price, testifying that it "did not make any difference" to his analysis. (Vol. 53, Tr. 2390-93) He also conceded that some of the freight advantage was in fact passed along to customers in the form of lower mill prices; for example, in the early 1970's southern mill prices were three to four dollars lower than

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[4]Contrary to respondents' contention (Resp. Br. 18), petitioners took strong and timely objection to those interrogatories. After the charge, but before the jury deliberations began, counsel stated: "My understanding, respectfully, of the law is that in order to ascertain measure of damages the plaintiff has the burden of proof of showing what the competitive price level would have been absent a particular practice in comparing that with what the actual price level was in the presence of the practice." (Vol. 56, Tr. 3573) Petitioners' opening brief on appeal argued that, "The court offered the jury no alternative measure of damage, which, realistically, forced the jury to choose the one offered" (pp. 82-83).

western mill prices. (Vol. 53, Tr. 2472) Under these circumstances, measuring damages by the *full* freight differential was palpably unwarranted.

In sum, the Fifth Circuit went wrong in approving an "automatic damages" standard that focuses exclusively on the freight element of price, and there is no basis for pretending that it did anything else. Certainly this is how the case is read by those who must live with its long-term effects. The *amici* all stress that the Fifth Circuit erroneously "rejected the argument by the plywood companies that the proper measure of damages should not rest solely on that one component but should take into account any actual offsetting effects on the overall prices that would have been charged under a different methodology of quoting freight charges." (Business Rountable Br. 3; *see also* Chamber Br. 3; NAM Br. 6; Bowie Br. 6)

4. There is a direct conflict between the Fifth and Ninth Circuits

Respondents' current contention that the results of the FTC proceeding have "no bearing on the present case" (Resp. Br. 15) is another striking reversal of their earlier position. The complaint filed by respondents' counsel of record was unequivocal that the FTC case involved "the same acts and practices which are the subject matter of this suit." (Complaint ¶28, *Strick Corp.* v. *Boise Cascase Corp.*, No. 74-1771) Respondents' very first evidence at trial was an elaborate presentation of findings from the FTC case. (Vol. 45, Tr. 150 *et seq.*) And in closing argument, respondents hammered the theme that the FTC had had "an investigation into *this very situation.*" (Vol. 56, Tr. 3244)

It was only when the Ninth Circuit fully vindicated petitioners that respondents sought to persuade the Fifth Circuit that the two proceedings were unrelated and that collusion was never an issue in the FTC proceedings. The FTC's complaint explicitly charged, however, that petitioners had acted "in combination with other companies." (91 F.T.C. 1, 5) Far from refusing to address this charge, the

Commission explicitly cited the ALJ's finding that there was "no overt collusion," and itself concluded that petitioners were "obviously not" in "a price fixing cartel." (*Id.* at 99 n. 10, 102, 105) On appeal, the Ninth Circuit joined the ALJ and the Commission in holding there was "a complete absence of evidence implying overt conspiracy." (637 F.2d at 582, App. J-18)[5]

Respondents cannot escape the Ninth Circuit result because the FTC proceeding was commenced under §5 of the FTC Act rather than §1 of the Sherman Act. Although the scope of the statutes is different, this difference cuts against respondents—§5 reaches all conduct proscribed by §1, plus more. *FTC* v. *Sperry & Hutchinson,* 405 U.S. 233 (1972). Consequently, the Ninth Circuit's finding of petitioners' innocence under §5 necessarily encompasses a finding of innocence under §1.[6]

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[5]The asserted differences between the records in the cases are more imagined than real. For example, respondents are wrong in claiming that the FTC did not call an expert. (*Compare* Resp. Br. 14 *with* 91 F.T.C. at 70-71) Similarly, respondents are wrong in asserting that they, but not the FTC, presented evidence of "buyer objection to the pricing system." (Resp. Br. 14, 15 n.30) All five of the exhibits cited by respondents were also exhibits in the FTC trial. They show only a few customer inquiries concerning the reason for the pricing methodology. The key fact remains that respondents, like the FTC, were unable to produce a single plywood buyer who would testify that the use of West Coast freight harmed him in any way.

[6]This was precisely the point made by petitioners' counsel in the remarks excerpted at page 13 of respondents' brief. In full context, counsel stressed that, *"in light of the findings of the Administrative Law Judge" that there was no collusion,* "we are faced with an entirely different case than the one that was alleged in the Federal Trade Commission complaint as originally issued *and on the basis of which the class matter was presented to Judge Cassibry."* (1/26/77 Tr. 20-21, 26-27) Only by omitting the underscored language and its context can respondents present these remarks as distinguishing between the FTC case and this litigation, rather than stressing their parallels.

Finally, on the measure of damages issue, respondents have no answer to the direct conflict between the Ninth Circuit's approach, which requires an analysis of *all* elements of price to determine the effect on total price, and the Fifth Circuit's approach, which looks solely at the freight element. On the contrary, they assert that *Catalano* bars the result reached by the Ninth Circuit and compels that reached by the Fifth Circuit, whereas petitioners urge precisely the opposite. The conflict is irreconcilable.

CONCLUSION

We respectfully submit that certiorari should be granted.

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Amicus Brief

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No. 81-1618

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

WEYERHAEUSER COMPANY and
WILLAMETTE INDUSTRIES, INC.,
Petitioners,

vs.

LYMAN LAMB COMPANY, ET AL.,
Respondents.

MOTION OF BOWIE-SIMS-PRANGE, INC., CASCADE PACIFIC LUMBER CO., NORTH PACIFIC LUMBER CO., AND M.L. SANDY LUMBER SALES CO., INC. FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1618

WEYERHAEUSER COMPANY and
WILLAMETTE INDUSTRIES, INC.,
Petitioners,

vs.

LYMAN LAMB COMPANY, ET AL.,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

These four plywood buyers, Bowie-Sims-Prange, Inc., Cascade Pacific Lumber Co., North Pacific Lumber Co., and M.L. Sandy Lumber Sales Co., Inc., respectfully move this Court for leave to file the accompanying brief as amici curiae. Petitioners have consented to the filing of this brief; respondents have not consented.

Our interest in this case arises from our status as purchasers of plywood and potential beneficiaries of the decision below.

Bowie-Sims-Prange is a small wood products distributor located near Dallas, Texas.

Cascade Pacific is a medium-sized wood products company in Portland, Oregon.

North Pacific is a large Portland-based plywood distributor with customers throughout the United States; its 1973 sales were approximately $327,000,000.

Sandy is a Corinth, Mississippi distributor of wood products that bought, during the years in question, 800 to 1,000 truckloads of plywood a year.

Bowie-Sims-Prange and Sandy are members of the plaintiff class. Cascade Pacific and North Pacific opted out of the class.

As described in the accompanying brief, knowledgeable personnel from these amici and other plywood customers gave testimony in this action and the related FTC proceedings. Despite the windfall damages they could receive from a decision adverse to the petitioning plywood manufacturers, plywood purchasers forthrightly testified that the market for plywood has always been competitive and that petitioners' method of quoting prices did not make it less so. They explained that, to the contrary, the challenged practice of quoting on the basis of West Coast freight increased competition and benefitted amici and other plywood customers by facilitating ready comparison of prices being offered by potential suppliers.

This Court has emphasized that it is for the benefit of customers such as these amici that the Sherman Act was enacted. The Fifth Circuit ignored that the pricing format it held unlawful was the one preferred by customers and rendered a decision which, unless reversed, will work a grave injustice in this case and be a bad precedent of widespread impact in future cases.

As plywood purchasers, the class member amici are potential financial beneficiaries of the judgment below. The amici believe, however, that their long-term interests—

and the long-term interests of all businesses and consumers—are best served by rational antitrust standards. They wish to place their perspective before the Court for its consideration when determining whether to review this important matter.

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WEYERHAEUSER COMPANY and
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BRIEF OF BOWIE-SIMS-PRANGE, INC., CASCADE PACIFIC LUMBER CO., NORTH PACIFIC LUMBER CO., AND M.L. SANDY LUMBER SALES CO., INC. AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTEREST OF AMICI CURIAE

These amici are large and small buyers of plywood, some of whom stand to receive a great windfall if the judgment below is left undisturbed.[1] Nonetheless, all the amici urge this Court to grant certiorari because the decision of the Fifth Circuit rests on antitrust liability and damage standards that are divorced from competitive realities and harmful to business.

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[1] As stated in the accompanying motion, amici Bowie-Sims-Prange, Cascade Pacific, North Pacific and Sandy are plywood purchasers and (with the exception of Cascade Pacific and North Pacific) members of the plaintiff class.

Representatives of amici and other plywood customers testified both in the proceeding below and in the parallel FTC proceedings that there was nothing wrong with the method of quoting prices challenged in the two proceedings. In fact, they showed how anyone who understood the plywood business would see that the practice facilitated competition. The Ninth Circuit recognized these competitive realities. The Fifth Circuit ignored them. Amici wish to bring the perspective of purchasers of plywood in the marketplace to this Court's attention in order to avoid an unjust and irrational result.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case in the Petition filed by Weyerhaeuser Company and Willamette Industries, Inc.[2]

SUMMARY OF ARGUMENT

As plywood customers, these amici have followed and participated in both this private litigation and the related Federal Trade Commission proceedings. Employees of these amici and other plywood customers testified that petitioners' method of quoting prices was a natural response to competitive conditions; that it had no adverse effect on the delivered price of plywood; and that it actually had the procompetitive effect of facilitating price comparisons.

The Fifth Circuit, in holding unlawful the plywood industry's historic method of quoting prices, ignored that this pricing method was the one preferred by customers who actually buy plywood in the marketplace and who would have a powerful incentive to testify against re-

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[2] The analysis in this Brief has equal application to Georgia-Pacific Corporation's petition in No. 81-1619. Amici have not filed a Brief in that case because of their desire to avoid burdening the Court with duplicative filings.

spondents' pricing practices if they were in fact anti-competitive. In contrast, the Ninth Circuit recognized the significance of customer preferences, and properly vindicated the same pricing practices. The Fifth Circuit's decision is grounded on faulty legal and economic premises, and these amici urge the Court to grant certiorari in order to establish economically rational standards for antitrust conspiracy and damages and to correct the injustice that will be worked if that decision is not reversed.

ARGUMENT

As this Court noted in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977), it is "especially consumers" that the antitrust laws are designed to protect. Heeding this admonition, the Ninth Circuit found significant "the complete lack of buyer testimony objecting to the practice" of quoting on the basis of West Coast freight. The Ninth Circuit noted that, indeed, buyers "frequently expressed a preference" for receiving price quotations in that format because it facilitated price comparison by buyers. *Boise Cascade Corp.* v. *FTC*, 637 F.2d 573, 580 (9th Cir. 1980). In sharp contrast, the Fifth Circuit ignored the avowed preference of consumers.

Had the Fifth Circuit given proper consideration to the informed views of plywood purchasers, it would have recognized that the use of the West Coast freight format was a procompetitive—not anticompetitive—practice. The practice fostered a vigorously competitive marketplace for plywood. Robert Ney, the chief plywood buyer for Wickes, the world's largest plywood customer, described the plywood market as "a volatile market" in which price lists "are no good generally five minutes after they are printed." (Vol. 54, Tr. 2733, 2743.) The president of amicus North Pacific pointed to the plywood market as "a perfect example of supply and demand. To me it's the

greatest free market that I have ever seen in my life." (David Dep. 117.)[3]

Contrary to the Fifth Circuit's holding that respondents' use of a West Coast pricing format reflected a conspiracy, this method of quoting prices was—as employees of these amici made clear in their testimony—a reaction by sellers to the *preference of their customers.* As the then president of amicus Bowie-Sims-Prange explained:

> "[T]he southern-pine plywood mills adopted this pricing, I believe, simply because you don't come in as an infant and change an entire established market and tell them, or tell dealers, that 'We are going to quote you a different way; we don't want to quote you the way you are accustomed to being quoted.' They did what any reasonable marketing people would do when they are trying to break into the market. They quote in the fashion or the form that the buyer is accustomed to."

(FTC Tr. 2790-91. *See also* the testimony of *Mr. Kelly,* Vol. 52, Tr. 2134; *Mr. Coston,* Vol. 48, Tr. 1035; and *Mr. Pratt,* Vol. 47, Tr. 816, 819.)

The reason amici and other customers preferred quotations on a West Coast comparison basis is plain. *A customer's only concern is with delivered price.* When all sellers quote a delivered price that is composed of a fluctuating mill price and a standardized West Coast freight factor, customers can look directly to the mill prices and determine which seller's price is lowest, and by precisely how much.

Consequently, these amici and other plywood customers expressly stated in both this private litigation and the FTC proceedings that they preferred petitioners and other

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[3] *See also* Helm Dep. 20-21; Prange FTC Tr. 2779-82; Sandy FTC Tr. 2932-34; Vol. 54, Tr. 2771; Vol. 54, Tr. 2803-04. The customer depositions in this case, some of which were read at trial, and the customer FTC testimony involved different purchasers making essentially the same points. This brief quotes from both.

southern plywood suppliers to use West Coast freight in their price quotations. For example, the Wickes buyer testified that it was "[m]uch easier for me" to work with quotes on a West Coast comparison basis rather than an f.o.b. southern mill price plus actual freight. (Vol. 54, Tr. 2747.) Similarly, Mr. Prange of amicus Bowie-Sims-Prange testified in the FTC proceeding that "I, as a buyer, preferred a mill base with a constant freight factor, which would permit me to make a comparison between plywoods, southern and western." (FTC Tr. 2810.) Mr. Helm of amicus Cascade Pacific agreed that the use of West Coast freight "facilitated trading for Cascade Pacific." (Helm Dep. 24.)[4]

This Court has recognized that the determination whether a particular practice violates the Sherman Act "must focus on whether the effect and . . . the purpose of the practice are to threaten the proper operation of our predominantly free market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979). The plywood practices at issue before the Fifth Circuit did not have the effect or purpose of restricting price competition. To the contrary, as plywood customers testified, they had the procompetitive effect of facilitating price comparisons, without having any adverse effect on delivered prices.

This point was repeatedly stressed by the customers. As Mr. Ney of Wickes testified when asked "does the form

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[4] *See also* the testimony of *Mr. Pratt*, Vol. 47, Tr. 816-20; *Mr. Nash*, Vol. 48, Tr. 986; *Mr. Coston*, Vol. 48, Tr. 1036-37, 1071, 1075; *Mr. Cobb*, Vol. 49, Tr. 1373-76; *Mr. McCurdy*, Vols. 49, 51, Tr. 1459-60, 1475, 1531; *Mr. Davis*, Vol. 51, Tr. 2004-06; *Mr. Kelly*, Vol. 52, Tr. 2134-35; and *Mr. Frick*, Vol. 53, Tr. 2493-94.

in which the price is quoted in any way affect what that delivered price is going to be?":

> "To my knowledge, no. Both include mill price plus the freight. No matter which way you jumble it up, I'm still looking for that delivered cost."

(Vol. 54, Tr. 2749.) Mr. Helm explained that delivered prices would not change if sellers shifted to an f.o.b. southern mill price plus actual freight "because the supplier would raise the mill price." (Helm Dep. 25.) As Mr. David summed up, "I don't think there is any question" that, "regardless of the form in which the price is quoted . . . North Pacific Lumber, as a plywood purchaser, would pay the same competitive[ly] established delivered price." (David Dep. 82-83.)[5]

In measuring damages, the Fifth Circuit mistakenly focused solely on the *freight* component. It failed to examine the only price important to buyers—*the delivered price of plywood.* A customer paying a delivered price of $100 does not care whether it is expressed as $80 plus $20 in West Coast freight, or as $90 plus $10 in actual freight. As these amici and others testified, the delivered price of the southern plywood will be the same under either format.

In short, the so-called "freight differential" on which the Fifth Circuit placed its sole emphasis has nothing to do with what is important to those in the industry—the bottom-line price for plywood. The Fifth Circuit's approval of the freight differential as the measure of damages makes no sense to anyone knowledgeable of how plywood prices work. The decision is clear legal error, has

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[5] *See also* the testimony of *Mr. Coston*, Vol. 48, Tr. 1080-81; *Mr. Schmidt*, Vol. 50, Tr. 1633-34; *Mr. Cobb*, Vol. 49, Tr. 1378; *Mr. Hedrick*, Vol. 48, Tr. 1189-90; and *Mr. Nash*, Vol. 48, Tr. 1010-15.

led to potentially staggering damages in this case, and will work great mischief in the area of antitrust damage law unless reversed.[6]

CONCLUSION

These amici are in an unusual position. The class member amici will receive a substantial financial windfall if the Fifth Circuit's judgment is not reversed. But then they, as all businesses, would be subject to the irrational antitrust liability and damage standards applied by the Fifth Circuit. These legal standards (1) permitted a finding of conspiracy based on the producers' use of a pricing format that customers most preferred, (2) condemned as an unreasonable restraint of trade a practice that in truth enhanced competition by making it easier for customers to compare price quotes, and (3) imposed damages under a mechanistic formula that overlooked the critical question of whether, and how much, petitioners' pricing format increased the delivered prices amici and other plywood customers paid. We urge this Court to grant certiorari to correct these errors.

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[6] The irrationality of the Fifth Circuit's measure of damages is shown by the fact that two plywood customers in the same city who paid the same amount on the same day will receive different damages based solely on the location of their respective suppliers.

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Amicus Brief

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IN THE

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OCTOBER TERM, 1981

WEYERHAEUSER COMPANY, *et al.*,
Petitioners,

v.

LYMAN LAMB COMPANY, *et al.*

GEORGIA-PACIFIC CORPORATION,
Petitioner,

v.

LYMAN LAMB COMPANY, *et al.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF THE BUSINESS ROUNDTABLE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND PROPOSED BRIEF IN SUPPORT OF PETITIONS

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Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1618

WEYERHAEUSER COMPANY, *et al.*,
Petitioners,

v.

LYMAN LAMB COMPANY, *et al.*

No. 81-1619

GEORGIA-PACIFIC CORPORATION,
Petitioner,

v.

LYMAN LAMB COMPANY, *et al.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION OF THE BUSINESS ROUNDTABLE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Business Roundtable, an association of chief executive officers of approximately 200 major American companies, moves pursuant to Supreme Court Rule 42(1), for leave to file a brief as *amicus curiae* in support of the petitions for writs of certiorari to review the

judgment of the United States Court of Appeals for the Fifth Circuit entered on September 8, 1981, in this case, *In re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981). This motion is made necessary by the refusal of respondents to consent to the filing of the appended brief.

The case now before the Court is the first national class-action antitrust case to be litigated to judgment. Prior to this case, the typical pattern in major antitrust class actions has been pre-trial settlement among all parties. Although many defendants chose to settle in this case, the three petitioners did not. In a decision that facially conflicts with the result reached by another circuit, the non-settling defendants have become exposed to enormous financial liability. For all these reasons, the case has received considerable attention from all segments of the business community.[1]

There is a widespread concern that the decision below will substantially and unjustifiably increase the risks of defending massive antitrust actions. A jury was permitted to adopt a damage calculation that may result in liability of over a billion dollars without any realistic economic proof to support a finding of antitrust injury or to measure its amount. Both the decision itself and the approach that it reflects, therefore, may have a direct impact on the business judgments and the litigation strategy, including settlement decisions, of many of the companies involved in antitrust cases, either as plaintiffs or as defendants.

The Business Roundtable believes that it would be helpful to explain to the Court why the decision below has consequences that extend beyond the parties and why it is important for the Court to examine the issues presented in the petition. For this reason, we request that the Court

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[1] *See, e.g.*, Editorial, *Treble Trouble*, Wall St. J., Oct. 29, 1981, at 30, col. 1; Blyskal, *Still in the Woods*, Forbes, Oct. 26, 1981, at 70.

grant the motion of The Business Roundtable for leave to file a brief as *amicus curiae* in support of the petitions.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1618

WEYERHAEUSER COMPANY, *et al.*,
Petitioners,

v.

LYMAN LAMB COMPANY, *et al.*

No. 81-1619

GEORGIA-PACIFIC CORPORATION,
Petitioner,

v.

LYMAN LAMB COMPANY, *et al.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF PETITIONS

The Business Roundtable, as *amicus curiae,* urges that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on September 8, 1981, *In re Plywood Antitrust Litigation,* 655 F.2d 627 (5th Cir. 1981).

INTEREST OF THE AMICUS CURIAE

The Business Roundtable is an association of nearly 200 chief executive officers of major American companies. The Roundtable's purpose is to examine public issues that affect the economy and to develop and present positions that reflect sound economic principles and responsible public policy. The Roundtable has presented these policy statements in testimony concerning pending legislation before various Congressional committees and in *amicus* briefs before appellate courts.

As explained more fully in the accompanying Motion, the Roundtable believes that the issues raised by this case are of general importance to the business community. American companies involved in antitrust litigation, as plaintiffs or defendants, need to have the governing standards economically sound and clearly defined. For the reasons that follow, the decision below fails to satisfy either goal.

Judicial decisions like the one below, which ignore economic realities and the commands of this Court, undermine the predictability on which businessmen and their counsel rely. The opinion in this case is particularly harmful because of its notoriety.[1]

STATEMENT

The Court of Appeals for the Fifth Circuit has upheld a jury verdict which (1) found that petitioners, three major plywood companies, had committed a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, by

[1] The Roundtable takes no position on the ultimate merits of plaintiffs' antitrust complaint. Our purpose is to suggest that the court below applied erroneous legal standards of proof and to explain the significant policy reasons for granting the petitions.

agreeing on an element of price and (2) adopted a damage formula that could lead to a damage award of more than $1 billion.

The Fifth Circuit's approach conflicts with this Court's decision in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981), which rejected a superficial and mechanistic calculation of damages. Its basic approach is also contrary to decisions of this Court, reaching back almost a decade, which have emphasized the need for a realistic assessment of economic facts. *E.g.*, *Continental T.V., Inc., v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

According to the court below, the violation consisted of a parallel method of quoting prices and an agreement to use one specific component—"West Coast freight"—in calculating the prices offered to customers. There was no claim that the plywood companies agreed on the overall price that they would charge their customers, nor did the court deny the companies' contention that, in fact, the ultimate prices reflected vigorous competition on the basic component, the "mill price."

According to petitioners, the case was tried on the assumption that damages would be addressed in a later proceeding. On its own motion, however, the trial court submitted an interrogatory to the jury that permitted—indeed, virtually required—the finding that the proper measure of damages was the full difference between the "West Coast Freight" component and the actual freight expense for each shipment. In upholding that ruling, the court of appeals rejected the argument by the plywood companies that the proper measure of damages should not rest solely on that one component but should take into account any actual offsetting effects on the overall prices that would have been charged under a different methodology of quoting freight charges. The

court reasoned that "proof of losses which border on the speculative is allowed in order to facilitate the policy of the antitrust laws." 655 F.2d at 635. Even if speculation were permissible, however, it may not encompass a disregard of reality.

In stark contrast, the Ninth Circuit, examining the same pricing practices in this industry, found no antitrust violation at all. *See Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980) (holding that the pricing practices did not constitute an "unfair method of competition" within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45). Focusing on substance not form, the Ninth Circuit found that there was "substantial bargaining in the base price of plywood" (*Id.* at 579) and that customers believed that the system of quoting prices in terms of "West Coast Freight"—which many of them preferred—"had no effect on prices. . ." *Id.* at 580. Moreover, in a conclusion flatly at odds with the Fifth Circuit's willingness to approve a one-dimensional measure of damages, the Ninth Circuit concluded that it was a "common-sense proposition" that the plywood companies could have and would have "adjust[ed] the index [mill] price upwards if they were quoting delivered prices in terms of actual freight" *Id.*

REASONS FOR GRANTING THE WRIT

The decision below could result in the largest antitrust damage award in history. Petitioners question whether the court below applied the correct legal standard in permitting the fact-finder to infer from "parallel conduct plus contacts" that they had conspired to fix a component of price. Although the Roundtable takes no position on what the evidence showed, it is a significant question whether, by failing to insist that each alleged conspirator's actions be found contrary to independent self-interest—and thus explainable only by inference of agreement—the court below broadened the conspiracy net in

conflict with standards adopted by this Court and other circuits.[2] Mere parallel conduct, knowingly pursued, may not properly imply illicit concert if there are reasonable business grounds, like those found by the Ninth Circuit in the plywood industry (637 F.2d at 574, 577-80), for companies to take the same action independently.

The Roundtable's primary interest in this case, however, lies not in the standards governing permissible inferences of conspiracy. Our principal concern is the failure of the Fifth Circuit to require realistic economic evidence and analysis of the effects of the challenged conduct before imposing massive treble-damage liability. This Court has mandated that economic reality, not mere labels or mechanistic calculations, should govern antitrust decisions. If the simplistic approach of the court below is upheld in this massive litigation, it will pose an unreasonable threat to many other antitrust litigants.

I. The Court Of Appeals Failed To Require Proof Of Actual Antitrust Injury.

The court below held that an agreement concerning the form of quoting prices and the inclusion of one component in pricing constituted a *per se* violation of Section 1 of the Sherman Act. *See* 655 F.2d at 632-33. The court evidently believed—erroneously—that attachment of the *per se* label virtually eliminated plaintiffs' burden of showing that the practice actually had an adverse effect on competitive prices paid by customers.

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[2] *See, e.g., Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 538-41 (1954); *Tose v. First Pennsylvania Bank*, 648 F.2d 879 (3d Cir.), *cert. denied*, 102 S. Ct. 390 (1981); *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 463 (7th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3695 (1982); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 658-59 (1962).

Whether a challenged practice is illegal *per se* or violates the rule of reason, however, the essential predicate for treble-damage liability is injury in fact. The Fifth Circuit seemed satisfied here with its view that, where plaintiffs have proven a *per se* violation, "it is not unlikely that plaintiffs also will be able to prove by a preponderance of the evidence that [they]. . . were injured." 655 F.2d at 635. This virtual presumption of injury conflicts with this Court's repeated rejection of arguments that the finding of an antitrust violation automatically "gives rise" to a treble-damage claim under Section 4 of the Clayton Act, 15 U.S.C. § 15. *J. Truett Payne Co. v. Chrysler Motors Corp., supra,* 451 U.S. at 562; *see, e.g., Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.,* 429 U.S. 477, 486 (1977); *Perkins v. Standard Oil Co.,* 395 U.S. 642, 648 (1969).

The only evidence of injury to which the court below alluded was the conclusory testimony of plaintiffs' economic expert witness that the overall prices charged must have been higher because of the inclusion of the "West Coast freight" term. Acceptance of such facile testimony, however, ignored this Court's realistic assessment that " 'in the real economic world rather than an economist's hypothetical model,' the latter's drastic simplifications generally must be abandoned." *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 742 (1977) *quoting Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481, 492 (1968). Reliance on the conclusory statements of a single economic witness is unlikely to satisfy the plaintiffs' burden of showing that the fact of injury is "certain." *J. Truett Payne Co. v. Chrysler Motors Corp., supra,* 451 U.S. at 567 n.5, *quoting Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, 566 (1931). This skepticism seems particularly warranted where another circuit has looked at the same basic economic facts and concluded that the facts did not establish any injury at all.

In short, antitrust injury can only be proven by specific and reliable evidence about the actual economic effects of the challenged practice. The Fifth Circuit evidently decided to relax this requirement by indulging in an unwarranted assumption about the probable effect of concerted action. When the stakes are as large as they are in a nation-wide class action, proof of the fact of injury should require something more solid than assumption and surmise.

II. The Court Of Appeals Applied The Wrong Standard For Measuring Antitrust Damages.

Both the measure of damages adopted here and the definition of the plaintiffs' burden of proof on this issue depart from this Court's prior cases.

1. The measure of damages in a price-fixing case is the difference between the sums actually paid by the purchasers and the sum they would have paid in the absence of the defendants' illegal conduct. *E.g., Chattanooga Foundry & Pipe Works v. Atlanta,* 203 U.S. 390 (1906); *Wall Products Co. v. National Gypsum Co.,* 357 F. Supp. 832, 844 (N.D. Cal. 1973); *In re Transit Company Tire Antitrust Litigation,* 67 F.R.D. 59, 77 (W.D. Mo. 1975). The only measure of damages submitted to the jury here was the one propounded by the court *sua sponte,* the total amount of the difference between the West Coast freight component of the delivered price and the actual point-to-point freight from the seller's place of business to the buyer's. *See* Jt. App. Appendix I.

This formula ignored the undisputed facts that Southern plywood prices paid by customers were lower than Western plywood prices throughout the damage period and that there was vigorous daily competition in "mill price" among the Southern plywood producers. In addition, as the Ninth Circuit concluded, it was likely in these

circumstances that each of the Southern plywood producers would have adjusted the mill price upwards if the standard freight charge had been dropped. 633 F.2d at 580. The Ninth Circuit's analysis mirrored the realistic observation made by this Court that a "wide range of factors influence a company's pricing policies" and that price levels would not necessarily reflect "the impact of a single change in the relevant conditions . . ." *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 492 (1968).

The court below upheld the use of a measure of damages that focused solely on one component of price. That approach, however, is indistinguishable from the claim that a plaintiff in a Robinson-Patman Act case is entitled to "automatic damages" in the amount of the price discrimination, a view that the Court rejected last Term in *J. Truett Payne Co. v. Chrysler Motors Corp., supra*, 451 U.S. at 561-63.

2. The court below, nevertheless, approved this simplistic calculation because it believed that, once the plaintiffs established the fact of damage,[3] their burden of proving damages became "lighter" and that "proof of losses which border on the speculative is allowed in order to facilitate the policy of the anti-trust laws." 655 F.2d at 635. The use of a measure of damages which "borders on the speculative," however, violates the rule established as long ago as *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946), that even in an antitrust case "the jury may not render a verdict based on speculation or guesswork." *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124 (1969).

Only the First and Fifth Circuits employ the "borders on the speculative" formula for assessing the measure of

[3] As described in Point I above, the court also dispensed with the need for solid proof of the fact of damage, which the court presumed once it concluded that petitioners' conduct was illegal *per se*.

damages.[4] The Second, Third, Seventh, Eighth and Ninth Circuits do not allow such conjecture, but rather use a test which requires that there must be "a reasonable foundation from which a jury can calculate the amount of damages."[5] Because of the potentially staggering consequences of these different standards, the Court should take this opportunity to bring the minority of Circuits, including the court below, back into the mainstream.

III. The Decision Below Is Likely To Have Broader, Harmful Consequences.

The estimates of the petitioners' potential liability in this case range from $1.5 billion to $2 billion. Damage awards of such magnitude should not be based on an economists's "imagination," *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 25 (5th Cir.), *cert. dismissed*, 419 U.S. 987 (1974), or on the artificial isolation of one pricing component from all others. Rather, in antitrust cases just as in other areas of the law, damages should rest on a firm foundation based on relevant data about the actual effects of a violation on the ultimate prices actually paid.

The rulings and approach of the court below in this prominent case will discourage other companies from defending themselves on the merits, even when they believe that they have reasonable grounds to do so. The conduct of the petitioners was, after all, exonerated in the protracted proceedings with the federal government.

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[4] *Ford Motor Co. v. Webster's Auto Sales, Inc.*, 361 F.2d 874, 887 (1st Cir. 1966); *Hobart Brothers Co. v. Malcom T. Gilliland Inc.*, 471 F.2d 894, 903 (5th Cir.), *cert. denied*, 412 U.S. 923 (1973).

[5] *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 59 n.19 (2d Cir. 1980); *see Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1352-53 (3d Cir. 1975); *City of Mishawaka, Ind. v. American Electric Power Co.*, 616 F.2d 976, 987 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981); *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 893 (8th Cir. 1978); *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 813 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

Moreover, plaintiffs' counsel were apparently so unsure of victory and of the proper consequences of victory that, while the jury was deliberating, they were willing to settle for less than 1% of the damages that the subsequent verdict upheld below, may produce. *See* The American Lawyer, Dec. 1981, at 35.

The potential financial disaster for petitioners, who had a reasonable basis for defending themselves, is bound to have a chilling effect on other litigants. The stakes in modern, massive class actions can be so high that pursuit of a ruling on the merits may place the shareholders' entire enterprise at risk. These risks become intolerable if the litigants' conduct may be judged by the slippery standards upheld by the court below.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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Amicus Brief

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No. 81-1618

IN THE

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OCTOBER TERM, 1981

WEYERHAEUSER COMPANY, and
WILLAMETTE INDUSTRIES, INC.,
Petitioners

v.

LYMAN LAMB COMPANY, PLYWOODS DISTRIBUTING COMPANY, BATON ROUGE LUMBER COMPANY, CITY OF ARKADELPHIA, ARKANSAS, *et al.*,
Respondents.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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DISTRIBUTING COMPANY, BATON ROUGE
LUMBER COMPANY, CITY OF ARKADELPHIA,
ARKANSAS, *et al.*,
Respondents.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States (or "Chamber"), pursuant to Rule 36.1 of the Rules of this Court, hereby moves for leave to file the attached brief *amicus curiae* in support of the Petition for Writ of Certiorari,[1] and in support of its motion states:

1. The Chamber is the largest federation of corporations, trade associations, chambers of commerce and individuals engaged in business and the professions, with an aggregate membership in excess of 200,000.

2. The Chamber regularly presents its views to this Court and the lower federal courts on a number of public

[1] This motion is necessitated by the failure of the Respondents to consent to the filing of the brief; the Petitioners have given their consent.

policy issues of concern to the business community, including matters of antitrust law.[2]

3. The instant case presents a unique question concerning the proper method of calculating damages in private antitrust litigation which the Chamber believes merits review by this Court. In the area of antitrust law, no less than in any other area of the law, predictability is obviously desirable. Because the charge of the district judge to the jury concerning the method of computing damages and the jury's special verdict that the defendants are liable for damages (Appendix I) represent a departure from established principles of antitrust damages computation, this decision will remain as an unfortunate cloud upon litigants' ability to predict, at as early a stage as practicable, the amount of the potential recovery. This case cannot be dismissed merely as an anomaly which will neither be noticed nor followed by other courts. The magnitude of the potential class recovery itself at the same time magnifies both any perceived inadequacies in the courts' opinions and the likelihood that the opinions will be followed. Since the opinions below permit private antitrust litigants to focus upon one element of the price of a product, without regard for the total price, in assessing damages, then this case can only be viewed as a harbinger of increasingly larger judgments which are premised upon theories which, the Chamber believes, are at variance with the basic purpose and goals of the antitrust laws. And, the Chamber believes, the decisions of the lower courts here create precisely that type of uncertainty as to the determination of the amount of actual damages which is inappropriate when that amount can be trebled. As previously stated, Supreme Court review is appropriate to

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[2] *U.S.* v. *U.S. Gypsum*, et al. 438 U.S. 422 (1978); *First National Maintenance Corp.* v. *NLRB* ____ U.S. ____, 69 L.Ed2d 318 (1981); *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute* 448 U.S. 607 (1980); *Gould Corp.* v. *NLRB*, 612 F.2d 728 (3rd Cir. 1979); *Kouba* v. *Allstate*, No. 81-8131 (9th Cir.).

resolve this uncertainty now, rather than await future, perhaps equally troubling, application of the principles of damage calculation which are both explicit and implicit in the decisions below.

WHEREFORE, the Chamber respectfully requests that its motion be granted.

Respectfully submitted,

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Respondents.

STATEMENT OF INTEREST

The Chamber of Commerce of the United States (or "Chamber") respectfully refers this Court to the interest articulated in its Motion for Leave to file a Brief *Amicus Curiae* to which this brief is attached.

REASONS FOR GRANTING THE WRIT

The Chamber respectfully suggests that resolution of the propriety of the measure of damages[1] used in this case is particularly important in view of the fact that private antitrust

[1] This *amicus curiae* brief is limited to the issue of the measure of damages applied by the Fifth Circuit. The Chamber takes no position with regard to the merits of plaintiffs' antitrust complaint.

actions initiated each year remain at a high level, and national class action antitrust suits, involving massive amounts of money, are increasing.[2] The opinion of the Fifth Circuit below has important implications for all those cases. Supreme Court guidance could eliminate or substantially reduce needless litigation over damage calculation issues, would ensure some continued measure of predictability in the calculation of the potential gain of the plaintiff or loss of the defendant, and, therefore, could encourage early settlements of many cases: a result that could benefit all concerned.

It is against this backdrop that the Chamber requests the Court to grant petitioners' requests for Supreme Court review. For not only are staggering sums of money involved directly in this case, but the outcome of this case can portend a continuation of massive claims which are based upon a questionable method of calculating damages.

The instant case arose out of the defendants' historically based practice of quoting the price of plywood sold from their southern mills with "west coast freight" added to the base or "mill" price.[3]

Plywood was originally manufactured only in the Pacific Northwest. Freight from that location to any purchaser, wherever located, was easily calculated by reference to the standard shipping zones. Hence, the practice arose in the industry of quoting a "delivered" price of plywood in terms of the base or "mill" price plus "west coast freight."

Subsequent technological innovations allowed the manufacture of plywood using types of lumber available in the South. Accordingly, defendants established manufacturing facilities in the South. In what the Federal Trade Commission and the Ninth Circuit characterized as "a natural development"

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[2] The Annual Report of the Director of the Administrative Office of the United States indicates that on the average, over 1350 private antitrust cases have been filed each year since 1971. *See also,* Ross, *A Philadelphia Lawyer's Class-Action Gold Mine,* Fortune, September 7, 1981 at 100.

[3] The underlying facts, the proceedings below, and before the Federal Trade Commission and Ninth Circuit, are fully described in petitioners' briefs. We will not burden the Court with a detailed repetition of that information, but respectfully refer the Court to those briefs.

at its inception, the southern mills priced their plywood using the "west coast freight" convention for quoting price. *Boise Cascade Corp.* v. *Federal Trade Commission,* Appendix, J-2. Inasmuch as during the early years of the southern plywood industry, western plywood retained a dominant market share, (*Id.*) this method of pricing allowed purchasers to make a ready comparison of the prices of the Southern mills and those in the Pacific Northwest.

In this regard, the Ninth Circuit found, "Since southern plywood was widely viewed as inferior in quality to western plywood, it was necessary to sell southern plywood at a slightly lower price." *Id.* " The use of west coast freight made possible ready comparison between Western and Southern plywood prices, [and] encouraged expansion of southern mills . . . ."[4] Appendix, J-2-3.

This finding is at the heart of the Chamber's concern over the method of computing damages utilized by the Fifth Circuit in this case. For the Fifth Circuit virtually ignored the facts that defendants had utilized western freight precisely so that they could compete with western plywood, and, more importantly, had reduced the mill price so as to provide a competitive "delivered" price.

Despite these facts, the Fifth Circuit found that the measure of the plaintiffs' damages was the total difference between the western freight charged, and what the actual freight would have been. *In Re Plywood Antitrust Litigation,* Appendix, A-10. No offset was allowed for the reduced mill price given to the purchasers, and no analysis of the "delivered" prices was undertaken.

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[4] Utilization of eastern shipping rates would not have sufficed since eastern freight was computed on a point to point basis while western freight was computed by zones. *Boise Cascade Corp.* v. *F.T.C.,* Appendix, J-2 at n.1. (9th Cir. 1980)

By examining the western freight charge in isolation, the Fifth Circuit ignores well-established principles of determining damages in cases involving price fixing or other means of price enhancement. *See generally,* Harrison, *The Lost Profits Measure of Damages in Price Enhancement Cases,* 64 Minn. Law Review 751, 751-763 (1980). Prior to the Fifth Circuit's decision, it was well established that the,

> "fundamental objective of an award of damages is to place the plaintiff in the position in which he would have been but for the violation [footnote omitted]. In cases involving price fixing among sellers . . . , the basic measure of a purchaser's damages is the difference between the price paid by the purchaser and the price that would have been paid in the absence of the violation." [footnote omitted].

Adams and Bock, *Damages in Horizontal Price Fixing Cases,* 49 Antitrust Law Journal 141, 142 (1980). *Accord, Chattanooga Foundry & Pipe Works* v. *City of Atlanta,* 203 U.S. 390, 396 (1906). Because of the interrelationship between the mill price and the western freight charge, it defies these principles to determine the differences in delivered price by examining the western freight charge alone.

Moreover, we believe the Fifth Circuit's conclusion violates this Court's recent holding in *J. Truett Payne Co.* v. *Chrysler Motors Corp.,*[5] that plaintiffs in Clayton Act cases must prove more than mere violation to recover damages under §4. While the Court in *Payne* recognized that plaintiffs attempting to prove damages in §4 cases should not be held to a rigorous standard of proof, we suggest that inherent in the Court's rejection of automatic damages there is the proposition that the damages awarded to plaintiffs accurately measure the loss they have suffered.

The Fifth Circuit in essence admitted that its holding did not necessarily result in an accurate measure of the damages to the plaintiffs, stating that "given proof of the fact of injury, proof of losses which border on the speculative is allowed . . .", Appendix, A-10. But Section 4 of the Clayton Act

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[5] 451 U.S. 557 (1981).

awards the successful plaintiff in an antitrust action, "threefold the damages *by him sustained.*" 15 U.S.C. §15 (1976) (Emphasis added).

We submit that the Fifth Circuit's use of an inaccurate measure of damages that "borders on the speculative" contradicts the plain meaning of Section 4, as well as past decisions of this Court. Section 4, as noted above, only allows recovery for actual damages sustained. Here the Fifth Circuit goes one step further, awarding damages never incurred by the plaintiffs.

As the Honorable Cecelia H. Goetz [6] has noted:

> Where the fact of damage has been established, the courts are required to be liberal with respect to the degree of certainty required to prove its dollar amount, *although not to the point where reliance is placed on speculation or guesswork:*
>
> > Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, *while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. Story Parchment Co.* v. *Paterson Parchment, Paper Co.*, 282 U.S. 555, 563 (emphasis added).

Goetz, *The Basic Rules of Antitrust Damages*, 49 Antitrust Law Journal 125, 129 (1980) (emphasis added).

The Second Circuit has similarly stated that the "true measure of damages is the price increment caused by the anticompetitive conduct that originated or augmented the

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[6] Bankruptcy Judge, United States District Court for the Eastern District of New York.

monopolist's control over the market. * * * Accordingly, a purchaser may recover only for the price increment that 'flows from' the distortion of the marketplace caused by . . . anti-competitive conduct." *Berkey Photo, Inc.* v. *Eastern Kodak Co.*, 603 F.2d 263, 297 (1979).

The Fifth Circuit's application of an erroneous measure of damages stands these principles on their heads. The court apparently believes that the application of a measure of damages that is not based on the actual loss to the plaintiffs enhances the deterrent effect of the antitrust laws. *In Re Plywood Antitrust Litigation,* Appendix, A-10.

Section 4 of the Clayton Act is, of course, designed to both "deter violators and deprive them of the 'fruits of their illegality', and 'to compensate victims of antitrust violations for their injuries'." (citations omitted) *Pfizer Inc.* v. *Government of India,* 434 U.S. 308, 314 (1978).

The Chamber respectfully suggests, however, that inasmuch as the punitive nature of antitrust damages arises from the statutory trebling, it is contrary to both congressional intent and basic concepts of fairness to additionally penalize defendants by trebling damages the plaintiffs never incurred.

Professor Areeda has, in fact, suggested that it is unfair to subject defendants to treble damages,

> when novel principles are established, the law is unclear, or even where the liability determination rests on close and uncertain economic factual determinations . . .
>
> Thus, an appropriate scheme would reserve treble damages, like criminal sanctions, for well-defined offenses; provide for single damages in other cases; and perhaps even preclude damages where a previously unimpaired precedent is overruled.

2 P. Areeda & D. Turner, Antitrust Law §322, at 105 (1978). Professor Areeda's logic is particularly appropriate here, where,

on identical facts, two circuits have differed as to the existence of the violation.[7]

While Professor Areeda's suggestion calls for legislative action, the principle he espouses, that only economically sensible measures of damages be employed, is equally applicable here. Before plaintiffs can begin to prove their individual losses, the court must settle upon a formula that will accurately measure those losses. Then, any ambiguity in the proof of the individual plaintiff's losses can be viewed liberally in their favor. But where an accurate yardstick to measure the damages can be easily established, it defies logic to use a measure that "borders on the speculative."

CONCLUSION

The Chamber of Commerce respectfully urges that the petition for certiorari be granted.

Respectfully submitted,

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[7] The Chamber does not urge that treble damages are necessarily inappropriate in a case of this type, but rather points to Professor Areeda to demonstrate that it was particularly unjust for the Fifth Circuit to treble damages never incurred by the plaintiffs.

Amicus Brief

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Nos. 81-1618 and 81-1619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WEYERHAEUSER COMPANY and
WILLAMETTE INDUSTRIES, INC.,
Petitioners,

v.

LYMAN LAMB COMPANY, *et al.*,
Respondents.

GEORGIA-PACIFIC CORPORATION,
Petitioner,

v.

LYMAN LAMB COMPANY, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The National Association of Manufacturers (hereinafter "NAM"), by and through its attorneys, hereby moves this Court pursuant to Rule 36 of the Rules of the Supreme Court for leave to file a brief *amicus curiae* in support of the Petitions for Writ of Certiorari to the

United States Court of Appeals for the Fifth Circuit. The NAM has received consent from petitioners, but respondents, through their counsel, have refused consent.

The National Association of Manufacturers is incorporated under the laws of the State of New York as a non-profit voluntary business association representing approximately 11,600 manufacturing and related business concerns which, in the aggregate, account for an estimated 85 percent of all manufacturing employees and 80 percent of the nation's industrial output. In addition, through its Associations Department and the National Industrial Council, NAM is affiliated with approximately 158,000 businesses, the vast majority of which are engaged in interstate or foreign commerce and are thus subject to the Federal Trade Commission Act and the antitrust laws. As active participants in the free-market system of the United States, they have a vital interest in the proper interpretation and application of these laws.

The fundamental problem arising from the ruling of the Fifth Circuit Court of Appeals in the instant case is that, when compared with the result reached in the companion litigation in the Ninth Circuit Court of Appeals, it creates uncertainty about the standards to be used in determining the legality of parallel practices and in calculating damages where a violation is found. This uncertainty results not just from the legal analysis employed by the Fifth Circuit Court of Appeals, but also from the fact that two circuit courts of appeal reached dramatically different conclusions on virtually the same facts. Indeed, these divergent results underscore the difficulties faced by companies that are forced to decide, often without sufficient legal certainty, whether to settle or litigate an antitrust action filed against them.

Corporate attorneys and their clients must invariably assess the risks involved in litigating or settling both

legitimate and unfounded claims in many settings, but under the antitrust laws, this is a far more difficult process because the availability of joint and several liability and extraordinary remedies, such as treble damages, multiplies the risks tremendously. It is therefore of paramount importance that the rules by which businesses must conduct their affairs, and the analysis that will be used to determine the fact and amount of liability for violations of those rules, be as clear and consistent as possible.

Thus, we feel this case presents precisely the kinds of issues that this Court should hear and finally resolve. We urge that we be granted leave to file our brief *amicus curiae* to highlight the importance of these issues to American industry.

Respectfully submitted,

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

The National Association of Manufacturers (NAM) hereby submits this brief *amicus curiae* in support of the petitions for certiorari to the United States Court of Appeals for the Fifth Circuit. Our interest is set forth in the accompanying motion for leave to file this brief.

STATEMENT OF THE CASE

In the early 1960's, companies began to produce plywood in the southern United States to compete in established markets then supplied by West Coast plywood mills. To promote competitive price comparison, southern manufacturers quoted prices in the form of a base mill price plus West Coast freight, or the cost of shipping the plywood from the West Coast to the customer. The actual freight paid by the manufacturer was less than the quoted freight. The Federal Trade Commission challenged the practice of quoting West Coast freight under Section 5 of the FTC Act. Although it found no evidence of overt collusion, the Commission ordered southern plywood manufacturers to cease and desist from this practice on the ground that it restrained competition. On appeal, the United States Court of Appeals for the Ninth Circuit reversed, holding not only that there was no evidence implying an overt agreement but also that there was no substantial evidence of any anticompetitive effect. *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 582 (9th Cir. 1980).

Separately, private class actions were filed around the country by purchasers of southern plywood against the same defendants, alleging that their use of this price quoting format constituted a conspiracy to fix prices in violation of Section 1 of the Sherman Act. After these cases were consolidated in Louisiana, a jury issued a special verdict finding that petitioners had engaged in a conspiracy in restraint of trade, and found that damages should be based on the difference between the West

Coast freight used for quoting delivered prices and the actual freight charges. On appeal, the Fifth Circuit affirmed, holding that there was sufficient evidence for the jury to infer an industry-wide conspiracy, and that it was not unjust or unreasonable for the jury to award damages based solely on an expert's assertion that defendants realized additional revenue in the amount of the "phantom freight" charged.[1] *French Quarter Apartments, Ltd. v. Georgia-Pacific Corp.*, 655 F.2d 627, 635 (5th Cir. 1981).

REASONS FOR GRANTING THE WRIT

The legal analysis employed by the Fifth Circuit in affirming the antitrust violation in the instant case raises a number of issues which are of particular significance to the business community. For example, this case raises a question concerning the extent to which parallel conduct and opportunity contact between competitors are sufficient to support a finding of violation in circumstances where only the pricing format is involved, where the practice may be justifiable as an ordinary competitive decision separate and apart from the question of conspiracy, and where the record seems to suggest that the practice was one actually preferred by consumers. The analysis below also raises questions concerning the quantum and quality of proof required to establish that there was in fact any injury flowing from the challenged practice. Equally troublesome is how the Fifth Circuit Court of Appeals could have affirmed a finding that the defendants violated Section 1 of the Sherman Act on the basis of conduct[2] found by the Ninth Circuit Court of Appeals

---

[1] Phantom freight as used in this case means any difference between the West Coast freight quoted and the actual freight charge incurred.

[2] Many of the findings in the FTC proceeding were read into the record at trial in the Fifth Circuit. Only one live witness testified for plaintiffs, with the remainder of the evidence coming from depositions and exhibits. *See* Petition for Writ of Certiorari of Weyerhaeuser Co. at 7-8.

not to violate the broader prohibitions of Section 5 of the Federal Trade Commission Act, particularly since any trade practice which violates Section 1 of the Sherman Act should, by definition, also violate Section 5 of the FTC Act.[3]

These are questions of interest to the business community because they bear directly on the proper scope and interpretation of this nation's antitrust laws. To the extent that the foregoing questions are raised by the Fifth Circuit's analysis, its ruling generates potential uncertainty and confusion and unnecessarily complicates further the process of making legally proper business decisions. Although we view these as questions worthy of review by this Court, it is not our purpose to address them or plaintiff's antitrust complaint on the merits as they will be fully addressed by the main parties hereto. We would, however, direct the Court's attention to the very important issue raised by the lower court's method of determining damages under the circumstances of this case and our discussion will be so limited.

An Erroneous Standard Was Used Below To Determine The Proper Measure Of Damages

Our primary concern is with the legal principle underlying the jury's verdict on the measure of damages. After upholding the jury's finding of liability and the fact of damage, the Fifth Circuit ruled that the plaintiffs may prove the measure of damages by "just and reasonable inference" and by speculative proof in order to facilitate the policy of the antitrust laws. The jury

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[3] Section 5 of the FTC Act is broader in scope and encompasses violations of the Sherman Act. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 609 (1953). Thus, any violation of the Sherman Act is perforce also a violation of the FTC Act. *FTC v. Cement Institute*, 333 U.S. 683, 691-92 (1948). Without a significant difference in the evidence presented in the Fifth and Ninth Circuits, it is impossible to determine how these courts could have reached such dramatically different results.

computed the measure of damages by adopting the only formula suggested by the trial judge, simply taking the West Coast freight charge and subtracting the actual freight charge for shipments from southern mills. *See* 655 F.2d at 632. The judge's instruction to the jury effectively prohibited any consideration of the actual effect on competition from the use of the standard pricing format.[4]

Antitrust damages may so defy precise computation that a jury may measure damages on the basis of just and reasonable inferences. But neither the trial judge nor the Fifth Circuit allowed the jury to consider fully the impact of the use of the West Coast freight rate on the mill price and delivered price. Indeed, the jury was never instructed that damages should be measured with reference to what the competitive price would have been absent the violation. Inasmuch as purchasing decisions are made on the basis of comparative delivered prices, which necessarily include freight charges regardless of how they are stated, the approach adopted below is in direct conflict with the rule that damages should be based as nearly as possible on the difference between the price charged and the price that would have been charged in the absence of the antitrust violation. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981).

---

[4] The instruction reads in pertinent part: "If you conclude that, yes, the use of southern—of West Coast freight or of standard weights or both did cause damage to the people who bought southern pine plywood and western fir plywood respectively, you are then asked to go on to these questions 2(b) and 4(b), and that is to say whether the damage that was caused to the purchasers is, as the Plaintiffs contend in the case of West Coast freight, the difference between the West Coast freight and the actual freight. . . . The Plaintiffs are asking that you answer yes to that question. The Defendants are saying that—of course they are saying you shouldn't have to get to that question at all, but they are also saying answer no if you do get to that question." Trial Transcript Vol. 56 at 3553-55, *In re Plywood Antitrust Litigation* (Nov. 14, 1978), *reprinted in* Addendum to Petition for Writ of Certiorari of Georgia-Pacific Corp., at e-f.

To make this determination accurately, the jury should quite clearly have been instructed to consider the competitive impact actually produced by the use of the West Coast freight format. The omission of an instruction that would have allowed the jury to weigh this factor was tacitly accepted by the Fifth Circuit, indicating that damages need not relate to the effect of the prohibited practice in the marketplace.

Had the southern plywood manufacturers used an actual freight charge in computing their delivered price, they could have increased their mill price by the amount determined to be "phantom freight," and thus still could have maintained the same delivered price and market share which resulted from using the West Coast freight charge. Although mill prices from southern mills might have been higher than before, the delivered prices would have been the same, and customers making rational business judgments based on the goods' delivered price, quality, and availability should not have been affected.

Using the difference between the freight charged and the actual freight as the proper measure of damages in a case such as this simply ignores the practical realities of the marketplace and exaults form over rational economic analysis. While it is difficult to deny the superficial appeal and convenience of this approach to damages, the result reached actually goes far beyond the assessment of damages in gross disproportion to any harm that could have been done in a specifc case. When confronted with an antitrust challenge, companies should not be forced to make litigation and settlement decisions in an environment where the enormity of potential damages overwhelms the legal merits of their position and becomes the determinative consideration. Yet results such as that reached below may have precisely this effect on many companies. Thus, the ruling below neither fairly addresses the violation allegedly committed nor advances the legitimate policy objectives of the antitrust laws.

The primary policy justification for charging violators with treble damages is to raise a strong deterrent to the adoption of potentially anticompetitive practices. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968). It is not and should not be the policy of these laws or the courts literally to coerce companies into settling antitrust cases because of an increased potential for damage awards far in excess of triple the injury actually caused. Acceptance of this case for review by this Court would provide the opportunity to give precise instructions to all federal courts on the propriety of ignoring actual conditions in the marketplace when computing damages from an antitrust violation such as was alleged in this case.

CONCLUSION

Because its statutory language is so vaguely worded and all-encompassing, and because its treble damage, criminal, and administrative penalties are so dramatic, antitrust law is uniquely suited to interpretation and constant clarification in the federal courts. Virtually the entire range of prohibitions included within the Sherman Act's language against contracts, combinations or conspiracies in restraint of trade has been developed and refined by federal administrative and judicial precedent and is ultimately regulated by the Supreme Court. Given the nature and importance of the issues being raised, we submit that the instant case is an appropriate one for consideration by this Court. For these reasons, the NAM urges this Court to grant certiorari in this case to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Respondent's Reply Brief

Supreme Court, U.S.
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Nos. 81-1618 and 81-1619

IN THE

Supreme Court of the United States

October Term, 1981

WEYERHAEUSER COMPANY and
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Petitioners,

v.

LYMAN LAMB COMPANY, et al.,
Respondents.

GEORGIA-PACIFIC CORPORATION,
Petitioner,

v.

LYMAN LAMB COMPANY, et al.,
Respondents.

RESPONSE OF LYMAN LAMB COMPANY, ET AL. TO THE MOTIONS OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE BUSINESS ROUNDTABLE AND BOWIE-SIMS-PRANGE, INC. ET AL. FOR LEAVE TO FILE BRIEFS AMICUS CURIAE AND BRIEFS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents, Lyman Lamb Company, et al. hereby oppose the Motions of the Chamber of Commerce of the United States (or "Chamber"), The National Association of Manufacturers (or "NAM"), The Business Roundtable, Bowie-Sims-Prange, Inc., Cascade Pacific Lumber Co., North Pacific Lumber Co. and M. L. Sandy Lumber Co. for Leave to File Briefs Amicus Curiae and Briefs Amicus Curiae in Support of Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit and state:

1. The issues raised by the Chamber, the NAM and The Business Roundtable in their four Motions, totalling more than 31 pages, are substantially the same as those raised by petitioners Weyerhaeuser Company, et al. and Georgia-Pacific Corporation in their separate Petitions. As respondents will demonstrate in their Brief In Opposition to the Petitions for A Writ of Certiorari, the petitions for a writ of certiorari should be denied.

2. Bowie-Sims-Prange, Inc., et al. seek to introduce evidence in this Court which was either not presented to the jury below or was rejected by the jury.

3. The decision of the Court of Appeals rests exclusively upon the facts of this case. It does not conflict with any decision of this Court or of any Court of Appeals. It is totally devoid of any unusual or novel issue of law, and presents no legal issue of general importance that warrants Your Honorable Court's review.

4. For those reasons respondents refused to consent to the filing by the Chamber, the NAM and The Business Roundtable and Bowie-Sims-Prange, Inc., et al. of Briefs Amicus Curiae and Briefs Amicus Curiae in Support of the Petitions for Certiorari. Where, as here, such consent has

been refused a Motion for Leave to file such briefs is not favored. Rule 36 of the Supreme Court of the United States.

Dated: March 19, 1982

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Petitioner's Brief

1

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GEORGIA-PACIFIC CORPORATION,
Petitioner,

vs.

LYMAN LAMB COMPANY, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF ON THE MERITS OF PETITIONER GEORGIA-PACIFIC CORPORATION

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Dated: August 16, 1982

QUESTIONS PRESENTED

Damages

1. In a "single element" price-fixing case, did the trial court err by:

a. Failing to instruct the jury on the law of measure of damages in antitrust cases?

b. Failing to instruct the jury that damages in single element price-fixing cases are based upon the difference between the total price paid and what the total price would have been absent the conspiracy?

c. Failing to instruct the jury on measure of damages, while submitting special interrogatories which compelled the jury to choose a damage measure of either the total amount by which the single element allegedly was raised or zero damages, without regard to offsetting reductions in other elements of the total price?

Conspiracy

2. Did the trial court err in permitting the jury to find a conspiracy from parallel conduct plus communications among competitors which afforded no more than an opportunity to conspire, and did the court of appeals err in upholding a judgment based on that verdict?

3. Did the trial court err in linking defendants who settled before trial to the conspiracy found among the trial defendants on the basis of no more than parallel conduct?

PARTIES TO THE PROCEEDINGS

In addition to petitioner, appellants below were Weyerhaeuser Company and Willamette Industries, Inc.

In addition to Lyman Lamb Company, appellees below were Plywoods Distributing Company, Baton Rouge Lumber Company, and the City of Arkadelphia, Arkansas. The remaining plaintiffs in the cases consolidated for trial in *In re Plywood Antitrust Litigation,* Multidistrict Litigation No. 159, and the remaining members of the plaintiff class, consisting of all persons who purchased softwood plywood directly from the manufacturers during the period from February 23, 1968 through December 31, 1973, also have an interest in the outcome of the appeal.*

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* The following entities are subsidiaries and affiliates of Georgia-Pacific Corporation: Ashley, Drew & Northern Railway Company; California Western Railroad; Fordyce and Princeton R.R. Co.; Compania Forestal Equitoriana, S.A.; Four Hundred Health Club, Inc; Georgia-Pacific Export, Inc.; Georgia-Pacific Finance Company; Georgia-Pacific Leasing Corporation; Aztec Trading Company, S.A.; Compania de Navegacion Arboreous, S.A.; Exchange Oil & Gas Corporation; Bayou Hydrocarbons, Inc.; Georgia-Pacific International Corporation; Amazonia Compensados e Laminados, Limitada; Beaver Wood Fibre Company, Limited (The); Federal Packaging and Partition Company Limited; G-P Inveresk Corporation; Georgia-Pacific Building Materials Sales, Ltd.; Georgia-Pacific GmbH; Georgia-Pacific Finance, N.V.; Georgia-Pacific S.A.; Georgia Steamship Company, Inc.; Inveresk Group Limited; Inversiones Morgan, S.A.; Magallanes Trading Company, S.A.; Metro Steamship Company; P.T. Georgia-Pacific Indonesia; P.T. Kalimanis-Plywood Industries; Georgia-Pacific Investment Company; National Management, Inc.; Phoenix Athletic Club, Inc.; St. Croix Pulpwood Company; St. Croix Pulpwood, Limited; Holly Hill Lumber Company; Hudson Pulp & Paper Corp.; Hudson American Corp.; O.P.M. Co., Inc.; Montana Pacific International; Rex Timber Inc.; Saint Croix Water Power Company —New Brunswick (The); The Sprague's Falls Manufacturing Company (Limited); St. Croix Water Power Company—Maine; and Thacker Land Company.

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Nos. 81-1618 and 81-1619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WEYERHAEUSER COMPANY and
WILLAMETTE INDUSTRIES, INC.,
Petitioners,

vs.

LYMAN LAMB COMPANY, *et al.*,
Respondents.

GEORGIA-PACIFIC CORPORATION,
Petitioner,

vs.

LYMAN LAMB COMPANY, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF ON THE MERITS OF PETITIONER GEORGIA-PACIFIC CORPORATION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (*In re Plywood Antitrust Litigation,* 655 F.2d 627 (5th Cir.), *reh. denied,* 663 F.2d 601 (5th Cir. 1981)) appears, along with the judgment denying rehearing *en banc,* in the Appendix[1] as Appendices A and G, respectively. The unreported judgment and order of the district court for the Eastern District of Louisiana appear as Appendix B. The district court's order denying the motion for judgment *n.o.v.* and a new trial is unofficially reported at 1979-1 CCH Trade Cas. ¶62,459 (E.D.La. 1978), and appears as Appendix C. Its opinion granting class certification is reported at 76 F.R.D. 570 (E.D.La. 1976) and is reprinted as Appendix D. Because of its direct application to the issues raised in this case, the opinion of the Court of Appeals for the Ninth Circuit in *Boise Cascade Corp.* v. *FTC,* 637 F.2d 573 (9th Cir. 1980) is also included as Appendix J.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment of the Court of Appeals was entered on September 8, 1981, and petitions for rehearing and rehearing *en banc* were denied on November 3, 1981. Petitions for certiorari were filed on March 2, 1982 and were granted on May 17, 1982.[2]

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act (15 U.S.C. §1) provides, in pertinent part:

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[1] "Appendix" here refers to the appendix filed in conjunction with the petitions for certiorari, which is relied upon pursuant to Sup.Ct. Rule 30.1, and which will be referred to in a shorthand fashion as "App. ." References to the joint appendix filed in conjunction with this brief will be to "J.A. ." In the text which follows, the abbreviation "Vol." refers to a specific volume of the record on appeal, the abbreviation "PX" refers to the respondents' trial exhibits, and the abbreviation "Tr." refers to the trial transcript below.

[2] Petitioner joins in the separate brief on the merits filed by Weyerhaeuser Company and Willamette Industries, Inc., who also were defendants at the trial below and appellants in the court of appeals, and adopts the arguments in favor of reversal that are set forth in that brief.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . . "

Section 4 of the Clayton Act (15 U.S.C. §15) provides:

"That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

I.

PRELIMINARY STATEMENT.

A. Nature Of The Proceeding.

These cases involve two pricing practices utilized by various plywood manufacturers, which were the subject of a Federal Trade Commission proceeding and these civil antitrust suits brought under Section 1 of the Sherman Act. Plywood was sold to customers on a delivered price basis which was comprised of two components: a principal component consisting of an individually negotiated "mill" price, and a freight component. The challenged practices, which concerned only the freight component, consisted of: (1) the practice among Southern plywood manufacturers of calculating the freight component based upon the rail freight rate from the West Coast to the point of delivery; and (2) the practice among Western plywood manufacturers of calculating the freight component based upon rail freight rates computed at "standard," rather than actual, weights. The West Coast freight rates were based on Interstate Commerce Commission rail tariffs, which established various rates for geographic zones. The standard weights were estimates of what a given shipment of a given panel size of plywood would weigh; because plywood was sold before it was actually produced, such estimates were necessary in order to make any type of delivered price quotation.

The Fifth Circuit left standing a jury verdict against Georgia-Pacific Corp., Weyerhaeuser Company, and Willamette Industries, Inc. (plus thirty other alleged co-conspirators who settled prior to trial), for fixing the price of the freight component of the delivered price of plywood. The Fifth Circuit held, and the district court's instructions permitted the jury to find, that a conspiracy was properly inferred from evidence consisting primarily of parallel conduct, plus communications among competitors where standard weights were never mentioned, and where West Coast freight was mentioned very infrequently but neither discussed nor agreed upon. In addition, the district court permitted the verdict linking the thirty settled defendants to this conspiracy to stand under "slight evidence" consisting only of parallel conduct. That ruling is without precedent.

The Fifth Circuit also approved a "single element" formula, based upon the freight component alone, for the measure of damages to plywood purchasers—a formula submitted to the jury *sua sponte* by the district court, through "all or nothing" special interrogatories which did not ask the jury to consider the amount by which the total price of plywood had been affected by the challenged practices. These interrogatories were not accompanied by instructions permitting the jury to consider any other element of the price. Indeed, the district court clearly erred by failing to instruct the jury at all as to the proper measure of damages. As a result, the jury found that the measure of damages equalled the entire amount by which the freight cost allegedly was artificially raised, without considering whether the freight differential was offset in whole or in part by a correspondingly lower mill price. This "single element" approach to measuring damages conflicts with past decisions of this Court and other courts of appeals. The result thereby reached also conflicts with the decision of the Ninth Circuit which held, in reviewing a parallel action against the same defendants initiated by the Federal Trade Commission, that the challenged practices had *no* effect on the total purchase price. *Boise Cascade Corp.* v. *FTC*, 637 F.2d 573 (9th Cir. 1980), App. J.

The incongruent result of the Ninth and Fifth Circuit decisions is that in the former proceeding, the court found no

evidence that purchasers of plywood had paid higher delivered prices as a result of the practices at issue, while in the latter, the measure of damages approved by the Fifth Circuit permitted the finding of an overcharge equal to the full amount by which either West Coast freight or freight calculated according to standard weights exceeded actual freight. This finding could result in enormous payments by the petitioners to their customers. Estimates of damages reported in the press are truly staggering—ranging as high as *two billion* dollars.[3] According to the respondents' counsel, "[i]f the formula (for assessing damages) reached by the jury is applied, this will probably represent the largest antitrust verdict in history."[4]

B. The Procedural Setting.

Since Rule 23 of the Federal Rules of Civil Procedure was amended in 1966, private antitrust class actions have been filed with ever-increasing frequency. *See,* Kirkham, *Problems of Complex Civil Litigation,* 83 F.R.D. 497, 514 & n. 62 (1979). The present cases are the first antitrust class actions to be reviewed by this Court after being litigated to judgment. The issues presented take on special importance precisely because they arise in this context. The tremendous financial exposure which antitrust defendants face today in Rule 23 class actions (*see Reiter* v. *Sonotone Corp.,* 442 U.S. 330, 345-46 (1979) (Rehnquist, J., concurring)) requires that the courts approach the trial of such actions with the utmost caution and concern for the rights of all parties. The actions and rulings of the courts below in these cases consistently have been characterized by the absence of such caution and concern.

The specific issues presented here relate to the legal rules for proving conspiracy and measuring damages in private antitrust price-fixing actions. This Court has not definitively addressed either of these subjects for more than twenty-five

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[3] *See, e.g., Wall Street Journal,* May 18, 1982, at p. 2, c. 2; *id.,* Sept. 9, 1981, at p. 56, c. 2. Petitioner does not concede that the total damages will be anywhere near this amount, even should the result below stand.

[4] *Id.* at p. 56, c. 2. The four respondents before this Court received final summary judgments in their favor, from which immediate appeals were taken, pursuant to Federal Rule of Civil Procedure 54(b). These individual judgments total more than $1.1 million. The damage claims of all remaining class members currently are being litigated before the district court.

years. During that time, however, two new procedural developments have combined with two traditional doctrines to produce an enormous expansion of antitrust defendants' damage exposure. The two traditional doctrines are the requirement that damages be trebled, under Section 4 of the Clayton Act (15 U.S.C. §15), and the rule imposing joint and several liability on antitrust defendants (*i.e.*, the rule that one participant in a price-fixing conspiracy may be held liable not only for overcharge damages attributable to his own sales, but also for those attributable to sales by all the co-conspirators). The two more recent developments are the 1966 amendments to Rule 23, which facilitate the maintenance of antitrust class actions, and this Court's decision in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981), which precludes antitrust defendants from seeking contribution from co-conspirators.

The present cases demonstrate how the interaction of these four matters—trebled damages, joint and several liability, the class action device under amended Rule 23 and the denial of contribution—leads to geometric increases in an antitrust defendant's potential liability. The classes certified by the district court here may comprise as many as 200,000 direct purchasers of softwood plywood. The jury found conspiracies which included petitioner Georgia-Pacific and thirty-two other producers of softwood plywood. Under the rule of joint and several liability and the rule of no contribution, Georgia-Pacific could be held liable to all of the hundreds of thousands of class members for all overcharges on all sales by all of the co-conspirators, and could not bring contribution claims to compel the co-conspirators to bear their fair share of the damages.[5]

One obvious effect of the class action device, when combined with the other rules described above, is to magnify the harmful consequences of a trial court's errors. It therefore behooves the courts, in class action trials, to use extraordinary care to avoid error in instructing the jury and in ruling on motions for a directed verdict or judgment *n.o.v.* In the present cases, the courts below took the opposite approach, employing shortcuts and simplifications which involve violations of well-

[5] The thirty defendants who settled prior to trial paid a total of only $8,077,000, although they had over 50% of the total softwood plywood market during the damage period.

established legal principles and disregard of the petitioners' fundamental rights. At the conclusion of the trial, for example, the district court on its own initiative prepared and submitted to the jury oversimplified and misleading special interrogatories concerning the measure of damages. At the same time, it gave the jury no instructions at all concerning the legal standards for measuring damages in price-fixing cases. Because these elementary errors were committed in a class action trial, they subject the petitioners to many millions of dollars of additional potential liability to hundreds of thousands of claimants.

The modern antitrust class action, and its potentially destructive impact on defendants, is a background reality against which all the specific issues in these cases must be resolved. If the legal standards for proving conspiracy and measuring damages in private antitrust cases are left vague and uncertain, and if the lower courts are permitted to treat these fundamental matters as carelessly as they were treated here, then antitrust class actions will deserve the label "legalized blackmail." Handler, *The Shift from Substantive To Procedural Innovations In Antitrust Suits—The Twenty-third Annual Antitrust Review,* 71 Colum. L. Rev. 1, 9 (1971). Since the present cases are the first antitrust class actions to be litigated to judgment and reviewed by this Court, they will set a pattern for all such actions in the future. By correcting the errors committed below, this Court will both ensure justice for these petitioners and prevent unfairness to other defendants in present and future antitrust class actions.

II.

HISTORY OF THE PROCEEDING.

A. The Plywood Industry.

In the years prior to 1963, when virtually all plywood was manufactured from Douglas fir in the Pacific Northwest, the practice developed of quoting a purchase or "delivered" price consisting of two components: (1) an individually negotiated "mill" price, plus (2) a freight charge based upon the rail freight rate from the West Coast to the geographic zone of delivery ("West Coast freight"). 76 F.R.D. at 574; App. at D-3 to D-4. Since tariffs promulgated by the Interstate Commerce Commission resulted in identical freight rates for all sellers who

shipped to a given geographic area, it was the variation in mill prices which resulted in variations in delivered prices. Vols. 48, 49, 50, Tr. 894-95, 1048-50, 1347-48, 1534-36. Because most plywood was sold before it was manufactured, the practice also developed of quoting freight according to standard rather than actual weights, so that the purchaser could be provided with a firm delivered price at the time of quotation. Vols. 45, 47, 52, Tr. 657-58, 1212, 2247.

In December of 1963, following technological advances which made possible the use of Southern pine to make plywood, petitioner Georgia-Pacific opened the first softwood plywood mill in the South. 76 F.R.D. at 574; App. at D-3; Vols. 45, 46, Tr. 166, 489-90. To provide ease of comparison for buyers, Georgia-Pacific continued the practice of quoting a delivered price consisting of individually negotiated mill prices plus West Coast freight. Other Southern plywood producers soon followed. Vols. 49, 50, Tr. 1375, 1531. As explained by the Ninth Circuit, and confirmed by the record below:

> "The use of West Coast freight enabled buyers to compare western and southern plywood prices by reference to a single mill or index price, knowing that the precise difference would be reflected in a total delivered price. Without West Coast freight, comparison would also have been more cumbersome because southern freight rates are point-to-point rather than zone rates and vary according to the weight of the load." (637 F.2d at 574 n. 1; App. at J-2 to J-3; *accord,* Vols. 45, 48, 49, Tr. 299-300, 1035-36, 1374-76.)

Similarly, the record below supports the Ninth Circuit's conclusion that the use of standard weights facilitated the bargaining process by allowing the customer to focus on the truly significant variable of the delivered price—the mill price component. Vols. 45, 49, Tr. 247-51, 1365. Actual weights varied from mill to mill and even from shipment to shipment, and could not be determined accurately in advance of shipment. Vol. 48, Tr. 1212. The use of standard weights was therefore necessary to permit the seller to furnish advance delivered price quotations to the customer.

The Southern plywood industry grew steadily; by the mid-1970's, Southern mills accounted for nearly half of the nation's

production, with the three petitioners producing half of all Southern mill production. 637 F.2d at 574; App. at J-2. The utilization of West Coast freight by Southern producers and of standard weights by Western producers did not result in uniform delivered prices. Not only were Southern prices generally lower than Western prices, but the delivered prices among both Southern and Western producers differed from seller to seller and from transaction to transaction, fluctuating according to supply and demand, and in response to changing market conditions. 637 F.2d at 577; App. at J-9. *See* Vols. 48, 49, 50, 52, 54, Tr. 894-95, 1048-50, 1189-90, 1347-48, 1534-36, 2738-40.

B. The FTC Proceeding And The Ninth Circuit Decision.

The Federal Trade Commission initiated an action in April of 1974 against the three trial defendants below, Georgia-Pacific, Weyerhaeuser and Willamette, and two other plywood producers, Boise Cascade Corporation and Champion International Corporation. That complaint charged these producers with violating Section 5 of the FTC Act (15 U.S.C. §45) by their use, individually and in combination, of the West Coast freight and standard weight systems described above. Following an initial decision of the Administrative Law Judge ("ALJ") in 1976, the Commission issued an opinion and order in January of 1978. That order directed the producers to cease and desist from quoting West Coast freight, on the ground that "the concurrent although non-collusive adoption by competitors of an artificial method of pricing which restrains competition" was unlawful under Section 5. *Boise Cascade Corp.*, 91 F.T.C. 1, 103 (1978).

Much of the documentary evidence introduced by the respondents during the trial below was before the Commission's ALJ (*id.* at 51-52), yet he found "no proof that [the defendants] met and formally conspired to add West Coast freight, or to adopt [standard] weights" (*id.*). Nevertheless, he concluded that a conspiracy could be inferred solely from what he described as the parallel, interdependent use of a purportedly artificial pricing system. *Id.* at 77-78. The Commission, however, declined to adopt the ALJ's expansive interpretation of the law of conspiracy. It found that the

challenged practices had arisen innocently, and concluded that the producers were "obviously not" engaged in "a price fixing cartel." *Id.* at 99 n. 10, 102, 105. The Commission stated that even if the freight quotation practices of the petitioners had been perpetuated past the point in time when they were economically justifiable, the continuation of those practices could more credibly be attributed to "force of habit" than to collusion. *Id.* at 102. It further added: "[w]e hasten to note that the practice of including West coast freight in delivered price quotations is only one of many factors affecting the price of southern plywood." *Id.* at 98. As noted before, however, it then issued an order prohibiting the non-collusive use of the challenged practices.

In May of 1980, the Ninth Circuit denied enforcement of the Commission's order, holding that there was no evidence that the challenged practices had either undermined price competition or artificially raised the purchase price. *Boise Cascade Corp.* v. *FTC,* 637 F.2d 573 (9th Cir. 1980), App. J. The court of appeals found that the petitioners' freight quotation practices were "a natural and competitive development in the emergence of the southern plywood industry" (*id.* at 582, App. at J-18), observing that the delivered price of plywood appeared to have been unaffected by the practices:

> "Over the long run, the price for plywood sheathing rises or falls in response to market factors affecting supply and demand: housing starts, weather conditions, box car shortages and strikes. *We have found no evidence in the record suggesting that the price of plywood has been unresponsive to market conditions.*
>
> * * *
>
> "We need not discuss all the evidentiary disputes between the parties to determine that *there is not substantial evidence in the record, considered as a whole, to sustain the Commission's finding that petitioners' delivered pricing methods stabilized prices in the plywood industry at supranormal levels.* In truth, the Commission has provided us with little more than a theory of the likely effect of the challenged pricing practices.

* * *

"In light of the precedents and the statements of leading authorities on delivered pricing, including the Commission itself, *the existence of substantial bargaining in the base price of plywood provides at least a prima facie inference that competition has not been affected by the use of West Coast freight.*" (*Id.* at 577, 578, 579-80; App. at J-9, J-11 to J-12, J-13 to J-14 (emphases added).)[6]

In addition, the Ninth Circuit found no basis to conclude that the delivered price of plywood would have differed, had actual rather than West Coast freight been quoted. It ruled that the FTC had failed to rebut the "common sense proposition" that if Southern producers had switched to using actual rather than West Coast freight, they would have correspondingly raised their mill prices. *Id.* at 580; App. at J-14. This "common sense" proposition directly contradicts the assumption implicit in the measure of damages approved by the Fifth Circuit—that the mill price in each sale would have remained *exactly the same* had actual freight been quoted rather than West Coast freight. Moreover, the Ninth Circuit's conclusion that the record did not evidence anticompetitive increases in delivered prices is directly contradicted by the Fifth Circuit's approval of a measure of damage formula premised on the assumption that those prices were raised by exactly the amount by which West Coast freight exceeded actual freight.

C. The Present Case: Trial And Affirmance By The Fifth Circuit.

The trial of the private actions, filed under Section 4 of the Clayton Act, commenced in October of 1978, after the FTC's decision, but before the Ninth Circuit announced its decision refusing to enforce the FTC's order.

Four points about the record are necessary to an understanding of the questions presented in this case.

First, the evidence of a conspiracy or agreement to utilize the delivered price system was entirely circumstantial. No

[6] The Ninth Circuit also found "a complete absence of evidence implying overt conspiracy" (*id.* at 582; App. at J-18), and declined "to follow the Commission's suggestion that industry-wide adoption of an artificial method of price-quoting should be deemed a *per se* violation of section 5 by analogy to section 1 price-tampering cases." *Id.* at 581; App. at J-16.

witness testified to any such agreement and no document reflected one. Although there were minor differences, the substance of the evidence in both the trial below and in the FTC proceeding was identical. Indeed, the respondents introduced voluminous findings of fact from the FTC proceeding, repeatedly stressed the parallel to the Commission's action (Vol. 45, Tr. 152-83), and on two occasions erroneously implied to the jury that the FTC had found collusion among the plywood producers (Vols. 55, 56, Tr. 2980, 3244). The evidence introduced below consisted primarily of documents obtained from the defendants' files and the deposition testimony of the defendants' employees and the employees of their customers. The only live testimony came from two expert witnesses, one of whom testified on behalf of the petitioners, the other on behalf of the respondents.[7] No plywood purchaser testified that the use of West Coast freight or standard weights had adversely affected delivered prices. Indeed, the evidence established that most customers wanted the quotation of a delivered price containing a uniform freight factor, so that they could more readily compare mill prices. Vols. 45, 48-50, 51, 54, Tr. 299-300, 1035, 1071, 1075, 1374-76, 1459, 1531, 2004, 2747.

Second, the district court's instructions in effect permitted the jury to find an unlawful conspiracy to maintain the freight quotation practices from no more than: (1) the parallel use of these practices by the plywood producers, and (2) lawful contacts between some of the producers. *See* Vol. 56, Tr. 3536-40; J.A. 184-87.

Third, the district court submitted special interrogatories to the jury on the appropriate measure of damages, over the petitioners' objections, and despite the fact that both sides had conducted the trial as if that issue was not being litigated. Paragraphs 2(a) and (b) and 4(a) and (b) of the special verdict form submitted to the jury by the district court read as follows:

> "2. (a) Did the use of 'West Coast freight' in the pricing of Southern Pine plywood during the period from

[7] These cases are thus classifiable as "paper cases," where considerations of demeanor play a relatively unimportant role in this Court's review. *United States* v. *General Motors Corp.*, 384 U.S. 127, 141 n. 16 (1966).

February 23, 1968, to December 31, 1973, cause financial damage to the purchasers of such plywood?

"(b) If 2(a) is answered 'yes,' was that damage equal to the amount by which 'West Coast freight' exceeded the actual freight charge (or the pick-up allowance)?

* * *

"4. (a) Did the use of 'standard weights' in the pricing of Western fir plywood during the period from February 23, 1968, to December 31, 1973, cause financial damage to the purchasers of such plywood?

"(b) If 4(a) is answered 'yes,' was that damage equal to the amount by which freight calculated on the basis of 'standard weight' exceeded the actual freight charge?" (App. at I-2 to I-3.)

These interrogatories permitted the jury to choose solely between zero damages, or damages equal to the full amount of any alleged freight differential, without regard to reductions in the mill price. They did not provide the jury with a means to indicate that damages were incurred in some amount *less* than the *entire* amount of the freight "overcharge."

Fourth, the district court submitted these interrogatories to the jury without any instructions as to the law governing the measure of damages in an antitrust price-fixing case. It did not tell the jury that the measure of damages was the difference between the total price actually charged (including freight), and the total price that would have been charged absent the alleged conspiracy.

In November of 1978, the jury returned a verdict that petitioners Georgia-Pacific, Weyerhaeuser and Willamette had engaged in: (1) a conspiracy with all other Southern pine plywood manufacturers to use West Coast freight, and (2) a conspiracy with all other softwood plywood manufacturers to use the standard weight system in the pricing of Western fir plywood.[8] Not surprisingly, the jury adopted the only measure

[8] The first of these conspiracies allegedly included the three trial defendants and sixteen other Southern softwood plywood manufacturers, who were named as defendants but settled prior to trial. The second allegedly included the three trial defendants, the sixteen manufacturers mentioned above, and fourteen other Western plywood manufacturers who also settled before trial.

of damages (apart from zero) suggested by the trial court's interrogatories: the difference between West Coast freight and actual freight, and between freight computed according to standard weights and freight computed according to actual weights.

On September 8, 1981, the Fifth Circuit affirmed in all respects the trial court's judgment entered from the jury's verdict.

SUMMARY OF THE ARGUMENT

Damages. This case involves only a single element of the total delivered price of plywood. The petitioners were found by the jury to have conspired to fix *only* the freight component of the total delivered price, by using either West Coast freight or freight computed according to standard weights. No conspiracy was alleged or found with respect to the mill price, which was the major component of the total delivered price. The jury further found that the measure of damages attributable to these conspiracies consisted of the full amount of the alleged freight "overcharge," *i.e.*, the full difference between either West Coast freight and actual freight, or freight computed according to standard weights and freight computed according to actual weights. In so finding, the jury was *never told to consider* whether reductions in the mill price component of the total delivered price mitigated the amount of the alleged freight overcharge. As a result, its verdict is plainly erroneous, and the judgments based on that verdict cannot stand.

The jury's improper verdict was caused by the manner in which the trial court submitted the measure of damage issue. The trial court gave the jury no instructions concerning the legal rules for measuring damages in an antitrust case; that omission itself is plain error requiring reversal. Moreover, the court submitted special interrogatories which permitted the jury to find only one of two damage measures: zero damages, or damages equal to the full amount of any freight differential. The submission of such interrogatories, coupled with the district court's failure of instruction, compels reversal of the jury's verdict on damages.

Conspiracy. The trial court never instructed the jury that parallel conduct, coupled with communications among com-

petitors which afford no more than an opportunity to conspire, do not support a finding of conspiracy. This omission constitutes reversible error, even assuming *arguendo* that the record in this case would support a finding of conspiracy by a properly instructed jury.

The Fifth Circuit upheld the district court's denial of the petitioners' motion for a judgment *n.o.v.* on the premise that parallel conduct and communications between high-level personnel of competitors on pricing policy, support a finding of collusion. That standard is contrary to the law expressed by other lower courts, which hold that parallel conduct, plus opportunity evidence (consisting of either communications among competitors on topics other than the alleged conspiracy, or communications on that topic which amount to no more than mere intelligence gathering), do not support a finding of an agreement. The evidence in these cases consists of no more than that. Therefore, the Fifth Circuit's decision should be reversed.

Finally, the petitioners are being held liable for damages on purchases from themselves *and* from thirty defendants who settled before trial. The district court held that these defendants could be connected to the conspiracy found among the trial defendants by "slight evidence," consisting of no more than parallel conduct. That ruling is incorrect; even if the slight evidence rule is applicable, mere similarity of conduct does not constitute such evidence. Alternatively, the petitioner contends that the slight evidence rule is inapplicable, and that under a preponderance of the evidence test, the proof of connection in this record is legally insufficient.

ARGUMENT

I.

THE JUDGMENT ON THE JURY'S FINDING OF A SINGLE ELEMENT MEASURE OF DAMAGES MUST BE REVERSED.

A. Introduction.

The jury found only one element of the total delivered price of plywood, the freight element, to have been collusively fixed. There was no finding that the alleged conspiracy also

extended to the mill price, the major component of the total delivered price.[9] However, any measure of damages resulting from the jury's conspiracy verdict must be based upon the conspiracy's effect on the *total* price of plywood, not merely the freight element. This is because the product purchased by the respondents in this case was *plywood*, not the freight charge for delivering plywood. If the respondents have in fact been injured, the correct measure of their damages is the difference between the total price (including freight) which they paid for plywood, and the total price (including freight) at which plywood would have sold absent the alleged conspiracy.

The correct legal standard for measuring damages in antitrust cases was not applied below. Instead, the jury returned a verdict that damages to plywood purchasers exactly equalled the amount by which West Coast freight charges exceeded the actual freight charges, and the amount by which freight charges calculated according to standard weights exceeded such charges calculated according to actual weights. This measure of damages is erroneous because it only focuses on the freight element of the price, and thus improperly assumes that the overall delivered price of plywood automatically was raised by an amount exactly equal to the amount of the alleged overcharge on the freight element. The mill price is assumed to be unaffected under this analysis, regardless of the presence or absence of a West Coast freight or standard weight conspiracy.

Errors by the district court in submitting the issue to the jury led to this improper result. First, the jury was given no instruction or guidance concerning the correct legal standard for measuring damages in this case; in fact, *no instructions whatsoever* concerning antitrust damage law were provided. Second, the district court compounded its failure to instruct the jury by presenting the measure of damage issue by means of special interrogatories which offered the jury no choice other than adopting the measure proposed (damages based upon the total

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[9] The alleged conspiracy regarding standard weights related only to the freight element. The jury found that the use of standard weights resulted in an increase in the freight charge to the extent that freight calculated on a standard weight basis exceeded the "actual freight charge." Special Verdict, Question 4(b); App. I-3.

amount of "phantom freight") or finding zero damages.[10]

These procedural infirmities constitute plain error and independently warrant reversal, regardless of the sufficiency of the evidence on measure of damages. Review of that evidence, however, reinforces the conclusion that the jury's verdict was substantially influenced by the district court's errors, and that those errors therefore were not harmless. The verdict is also completely at odds with the Ninth Circuit's carefully reasoned conclusion that the pricing practices at issue had no effect upon total delivered prices.

B. Damages In Single Element Price-Fixing Cases, As In All Price-Fixing Cases, Must Be Measured With Reference To The Price Of The Whole Product.

It is fundamental in price-fixing cases that "[t]he measure of damages to one of the conspirators' customers is the difference between the price actually paid and the one at which the product would have sold absent the conspiracy." *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), *citing Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). *Accord, Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, 396 (1906).[11]

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[10] The district court also submitted the measure of damages issue *sua sponte* to the jury, contrary to the reasonable understanding of petitioners' trial counsel that this issue had been bifurcated for subsequent trial. Prior to trial, the court had severed for consideration in a subsequent proceeding the issue of the "amount of damages sustained by individual plaintiffs, intervenors and class members." "Pretrial Order No. 9," ¶10(d) (Mar. 27, 1978), Supp. Vol. 35, 20416-17, J.A. 127. It repeated this point during its opening comments to the jury. Vol. 45, Tr. 6; J.A. 131. Only when the district court showed its proposed special interrogatories to petitioners' counsel during a conference in chambers on November 10, 1978—after all evidence had been presented—did they become aware that the district judge believed measure of damages was an issue to be decided by the jury. The district court thus denied the petitioners their due process right to present evidence on the damage issue, and forced the jury to decide the issue without sufficient evidence to make a proper determination; petitioner Georgia-Pacific adopts the arguments made by petitioners Weyerhaeuser and Willamette on this point in their opening brief on the merits.

[11] This measure of damages links the plaintiff's recovery to the actual harm caused by the illegal conduct, and compensates the plaintiff only to the extent injury actually has been suffered as a result of the defendants' actions. This measure is compelled by the language of Section 4 of the Clayton Act, which provides that a successful plaintiff "shall recover threefold the damages

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In the typical price-fixing case, where the alleged conspiracy is directed to the total purchase price (as distinct from only one element of the total price), application of the above rule is straightforward; the actual "fixed" price is compared with the hypothetical competitive price of the product as a whole. In an alleged single element price-fixing case, however, a complicating factor is that the element allegedly fixed (in this case, freight) does not directly correspond to the product actually purchased by the plaintiffs (in this case, plywood). The rule for measuring damages, however, should be no different—damages must be based upon a comparison of the *total* "actual" price with the *total* "competitive" price, without isolation of the single price element allegedly fixed. A single element measure of damages does not allow for the possibility that other elements of the total price would have been correspondingly higher absent the alleged conspiracy, thereby offsetting the presumably lower price of the single element in a "competitive" market. Thus, a single element measure of damages is likely to overstate the actual effect of the alleged conspiracy on the total price of the product, resulting in a windfall recovery far in excess of the true damage sustained by purchasers.

Although this Court has never directly articulated the appropriate standard for measuring damages in antitrust cases involving products having a price consisting of multiple components, the rule that damages in single element price-fixing cases must be based upon consideration of the total price follows from *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980). *Catalano* clarified the issue of liability in single

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by him sustained" (emphasis added). It is also in accordance with the general principle of compensatory damages applied by the Court in several recent and analogous cases, *e.g., Carey* v. *Piphus*, 435 U.S. 247 (1978) (civil rights plaintiff denied procedural due process could not recover "compensatory damages without proof that such injury actually was caused" by the illegal conduct); *Mount Healthy City School Board* v. *Doyle*, 429 U.S. 274 (1977) (public employee terminated in part for unconstitutional reason could not recover back pay if defendant could show that it would have terminated employee anyway); *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (plaintiff bowling center operator could not recover lost profits where injury claimed was not the result of any anti-competitive actions by defendants).

element price-fixing cases, holding that a conspiracy to fix one element or term of a price is a *per se* violation of the Sherman Act. However, this Court recognized that the damages to purchasers under the agreement to eliminate credit terms alleged in that case would not automatically equal the value of the credit eliminated: "[I]t may be that the elimination of a practice of giving variable discounts will ultimately lead in a competitive market to corresponding decreases in the invoice price [*i.e.*, purchase price]." *Id.* at 648-49. Indeed, the Court explicitly noted the possibility that an agreement to fix one element of a price "may turn out to be harmless in a particular set of circumstances . . . ." *Id.* at 649.[12] The fact that agreements such as those alleged in *Catalano* and found in these cases may have diverse economic results, depending upon the facts of the particular case, should preclude methods of determining damages which focus upon only one element of the total price.

The single element damage measure adopted in this case is also inconsistent with *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981). In that case, the Court rejected an "automatic damages" standard under the Robinson-Patman Act, holding that the amount of the price discrimination could not be assumed automatically to equal the amount, if any, by which the plaintiff had been injured. Rather, the Court insisted that the "plaintiff must make some showing of actual injury" (*id.* at 562), a burden not satisfied merely by the testimony of its expert that some harm must have resulted. The single element damage formula at issue here is as arbitrary and unconnected to the respondents' actual injury as was the rejected "automatic damages" formula in *J. Truett Payne*.

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[12] In his dissent from the Ninth Circuit's decision in *Catalano*, Judge Blumenfeld indicated that damages had to be based upon the effect of the alleged conspiracy on the total price:

> "We hold that plaintiffs have made 'an adequate showing of some damage flowing from the agreement' to terminate credit. How to measure the damage is left unresolved; however, it is clear that the damage claim is derived from the increase in the cost of purchasing beer due to the elimination of free short-term credit." (*Catalano, Inc.* v. *Target Sales, Inc.*, 605 F.2d 1097, 1104 (9th Cir. 1979) (Blumenfeld J., dissenting), *rev'd*, 446 U.S. 643 (1980).)

Numerous lower court decisions stand for the proposition that antitrust damages must be measured with due consideration to all of the relevant circumstances which may have affected the total price. The fallacy of uncritical reliance on automatic damage formulas was well illustrated in *City of Mishawaka* v. *American Electric Power Co.*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981). There, a private utility company and its affiliates were found by the district court to have violated the Sherman Act by charging excessive wholesale rates to municipal customers, in comparison with the rates charged to their retail customers. In the words of the court of appeals:

> "[T]he [district] court found that the municipalities had been overcharged by the amount the wholesale rates charged them exceeded the amounts which they would have been charged under the utility's retail rates actually in effect. The court proceeded to award damages based solely on a tripling of the difference between the higher wholesale rates paid by the municipalities and the lower retail rates which the utility actually charged its retail customers . . . No other factor entered into the computation." (616 F.2d at 987.)

Observing that "[t]he formula used by the trial court is recommended by its simplicity, but the computation of damages should not be expected to be quite that much easier than the rest of this case," the Seventh Circuit rejected the above measure of damages, and held that the district court had improperly assumed that the wholesale and retail rates charged by the utility would have been equivalent in the absence of the antitrust violation. *Id.* The district court's assumption was found to be "totally without foundation" since, apart from the different methods of calculating rates imposed by regulatory authorities, "in all likelihood, the utility has dissimilar fixed and variable cost requirements which it must seek to cover in its respective wholesale and retail rates." *Id.*

A similar point was made by the district court in *Albertson's, Inc.* v. *Amalgamated Sugar Co.*, 62 F.R.D. 43 (D.Utah 1973), *aff'd in relevant part, vacated in part*, 503 F.2d 459, 463 (10th Cir. 1974), where the plaintiffs alleged (as was alleged below), that a zone-delivered pricing system unlawfully fixed

the freight element of the purchase price of sugar. The district court observed that the very assumption made by the respondents and the lower courts in this case—that the base-price level was a constant—was untenable:

> "[Plaintiffs] assumed that their cost of sugar would be lowered by an amount equal to the phantom freight they now pay. If base point pricing were to be abandoned, it is clear that [defendants] would have to raise their base price . . . The evidence indicates that some new basis price would have to be set . . . . " (62 F.R.D. at 53.)[13]

Likewise, the measure of damages approved by the courts below is premised on the unsupported assumption that the mill price of Southern plywood would have been identical absent the use of West Coast freight and standard weights. The trial court's "all or nothing" damage interrogatories, combined with the failure of instruction, did not alert the jury to question this assumption—the same assumption which (as will be explained below) was rejected by the Ninth Circuit as defying "common sense." *Boise Cascade Corp.* v. *FTC, supra,* 637 F.2d at 580; App. at J-14.

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[13] *See also Kypta* v. *McDonald's Corp.,* 671 F.2d 1282, 1285 (11th Cir. 1982), *petition for cert. pending* (No. 82-6), (in a tie-in case, "[a] determination of the value of the tied products alone would not indicate whether the plaintiff indeed suffered any net economic harm, since a lower price might conceivably have been exacted by the franchisor for the tying product. Unless the fair market value of both the tied and tying products are determined and an overcharge in the complete price found, no injury can be claimed . . . . ") *Siegel* v. *Chicken Delight, Inc.,* 448 F.2d 43, 52-53 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972) (same); *Berkey Photo, Inc.* v. *Eastman Kodak Co., supra,* 603 F.2d at 297-98 (measure of damages for monopolization limited to effect of defendant's wrongful acts rather than the difference between monopoly price and competitive price, where monopoly is lawfully acquired); *Union Carbide and Carbon Corp.* v. *Nisley,* 300 F.2d 561, 576-84 (10th Cir. 1961), *cert. dismissed sub nom. Wade* v. *Union Carbide & Carbon Corp.,* 371 U.S. 801 (1962) (relevant economic factors including existence of negotiated prices must be considered in determining damages); *Moore* v. *Southeast Toyota Distribs., Inc.,* 1982-2 CCH Trade Cas. ¶64,743 at 71, 604-05 (N.D.Ala. 1982) (same); *Jacobi* v. *Bache & Co.,* 377 F.Supp. 86, 93 (S.D.N.Y. 1974), *aff'd,* 520 F.2d 1231 (2d Cir. 1975), *cert. denied,* 423 U.S. 1053 (1976) (measure of damages for conspiracy to eliminate one element of commission payments must include consideration of other elements); *ILC Peripherals, Inc.* v. *IBM Corp.,* 458 F.Supp. 423, 434-36 (N.D.Cal. 1978), *aff'd sub nom. Memorex Corp.* v. *IBM Corp.,* 636 F.2d 1188 (9th Cir. 1980), *cert. denied,* 452 U.S. 972 (1981) (damage measure must separate effects of lawful from unlawful competition).

This Court has long recognized that damage inquiry cannot end with a simple, mechanical determination that isolates only one aspect of a supposed restraint of trade; rather, all relevant factors bearing on the amount of plaintiffs' claimed damages must be considered. "The possible beneficial byproducts of a restriction from a plaintiff's point of view can of course be taken into consideration in computing damages . . . ." *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 140 (1968). Reasonable estimates of damages by antitrust plaintiffs are acceptable only so long as they are "not shown to be attributable to other causes." *Bigelow* v. *RKO Pictures, Inc.*, 327 U.S. 251, 264 (1946).

The Court should announce that damages in single element price-fixing cases, as in all price-fixing cases, cannot be based upon consideration of only one variable in the price of the product, but rather must be based upon the difference between the total purchase price of the product and what that total price would have been in a hypothetical competitive market. The fact-finder must be directed to consider all elements of the price, not just the one element allegedly fixed, so that it can determine the effect of the conspiracy on the total purchase price of the product. Application of the correct legal standard would have precluded the arbitrary measure of damages adopted by the jury and upheld by the Fifth Circuit.

C. The Jury Was Neither Instructed Nor Allowed To Base The Measure Of Damages Upon An Analysis Of The Total Delivered Price, And The Damage Verdict Must Therefore Be Reversed.

The courts below failed to follow the correct legal standard for measuring damages in antitrust cases. The district court submitted the issue to the jury without any instructions on the applicable legal standards.[14] This omission, coupled with spe-

[14] In addition to its failure to instruct the jury on the subject of measure of damages, the district court also failed to give any instruction on the subject of impact, or fact of damage. The petitioners offered an instruction on this latter point, stating that "[t]o find injury with respect to any particular class member, you must find that that class member paid more for plywood than he would have paid in the absence of unlawful conspiracy." Defs.' Proposed Additional Instruction No. 89, J.A. 153. That proposed instruction was not given. The district court did tell the jury that, in answering the special

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cial interrogatories which focused solely on the freight element of the delivered price for plywood, effectively directed the measure of damages adopted by the jury. The Fifth Circuit, in upholding the verdict, did not require that the single element measure adopted reflect the effect of the alleged conspiracy upon the total delivered price.

Failure To Instruct The Jury. The district court not only failed to instruct the jury to consider any element of the price other than freight, but provided the jury with *no instructions whatsoever concerning the appropriate standards for measuring damages in antitrust cases.* Specifically, the trial court failed to instruct the jury: (1) to base damages upon the difference, if any, between the total delivered price paid by plaintiffs for plywood, and what that total price would have been absent the alleged conspiracy, and (2) to consider the effect of the alleged conspiracy on all elements of the delivered price, not just the freight element. Instead, the jury was simply asked to answer "yes" or "no" to a single element measure of damages, without being instructed to determine the ultimate issue upon which the amount of damages depended—the "competitive" price of plywood.

The Special Interrogatories. The district court's failure to provide instructions compounded the impropriety of the manner in which it submitted the damage issue to the jury. The special interrogatories focused solely upon the allegedly fixed element of the delivered price—freight—to the exclusion of the effect of the alleged conspiracy upon the mill price and hence the delivered price. Only two extreme alternatives were offered—either the "freight gain" was the measure of damages, or the respondents suffered no damages at all. The jury was not provided with a means by which it could indicate that damages were incurred in some amount *less* than the *entire* amount of

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interrogatories on damages, it had to determine whether the petitoners' practices caused "financial damage" to purchasers of plywood. Vol. 56, Tr. 3553; J.A. 194. However, with respect to impact, as with the issue of measure of damages, it never told the jury how to make that determination, or whether to take into account the fluctuations in the mill price component of the delivered price. In a case involving an alleged single element price-fixing conspiracy, such an instruction on impact was vital. The failure to give it was therefore clear error.

the freight "overcharge." For example, if the jury had found that, without the delivered price system, an amount equal to 70% of the freight "overcharge" would have been added to the mill price and 30% would have been passed through to the purchasers in the form of lower base prices, there was no means provided for them to communicate that conclusion. Instead, the jury would have been compelled to give a "no" answer to the interrogatories. Since the jury determined that defendants had engaged in a conspiracy, this alternative—zero damages—quite naturally would have seemed unpalatable.

The district court's submission of the damage issue to the jury without any instructions on the legal standards for measuring damages in antitrust cases was plain error. At a minimum, the district court should have instructed the jury that the West Coast freight and standard weights could not be considered in isolation, but merely as part of the overall delivered price, and that the measure of damages had to be based upon the amount by which that overall price was raised by the alleged conspiracy.

> "The idea that a jury should be given guidance in its decisionmaking is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. *See Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494, 498, 51 S.Ct. 513, 514, 75 L.Ed. 1188 (1931); Fed.R.Civ.Proc. 51. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." (*Gregg* v. *Georgia*, 428 U.S. 153, 193 (1976) (plurality opinion).)

Although *Gregg* was a criminal case, this Court's admonition that juries must be carefully instructed on the controlling principles of law should be no less applicable in civil cases. Most often, the ultimate goal of civil litigation from a plaintiff's perspective is to recover monetary damages for harm caused by the defendant. It hardly comports with the due process guaranteed to every litigant for the jury to determine the measure of damages without any instructions on the legal basis

for doing so. For this reason, failure to instruct the jury at all on the proper measure of damages should be regarded as the type of "plain error" which always requires reversal. *See, e.g., Chagas* v. *Berry,* 369 F.2d 637, 641 (5th Cir. 1966), *cert. denied,* 389 U.S. 872 (1967) (failure by trial court in fraud case to instruct jury on proper measure of damages was reversible error); *Arnott* v. *American Oil Co.,* 609 F.2d 873, 889 (8th Cir. 1979), *cert. denied,* 446 U.S. 918 (1980) (plain error for trial court to fail to instruct jury to segregate damage award between antitrust claim and other causes of action).[15]

The Federal Rules of Civil Procedure recognize the particular importance of proper explanation by the trial court when special interrogatories are submitted: "The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue." Fed.R.Civ.P. 49(a). Since the district court drafted and submitted the special interrogatories on its own initiative, without a request from any party, its failure to provide the jury with any legal standards for answering those questions concerning the measure of damages is all the more inexcusable.

In opposition to the petitions for certiorari, the respondents contended that the petitioners did not adequately object to the district court's submission of the special interrogatories and failure to instruct. This assertion is incorrect. Upon examining the proposed special verdict form, petitioners' counsel immediately objected, and repeated those objections in open court:

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[15] "It is the inescapable duty of the trial judge to instruct the jurors, fully and correctly, on the applicable law of the case, and to guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search for truth. The court must instruct the jury properly on the controlling issues in the case even though there has been no request for an instruction or the instruction requested is defective." (9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil,* §2556, pp. 654-55 (1971).)

See also Norfolk & W. Ry. Co. v. *Liepelt,* 444 U.S. 490, 498 (1980) (reversible error for trial court to fail to instruct jury regarding factor to be discounted in computing damages); *Landy* v. *FAA,* 635 F.2d 143, 147 (2d Cir. 1980) ("[b]ecause the jury was left completely at sea concerning the applicable legal standards, its findings did not constitute a proper and adequate factual basis for the fine imposed").

"We feel that [measure of damages] interrogatories should not be asked and except to it respectfully on several grounds. Number One, we believe that the notice to which we responded to trial here in New Orleans was for a liability trial, Your Honor. We did not put in any proof on measure of damages in this trial. We feel that the measure of damages is the kind of proof that normally comes in the second phase damage trial, not in the first phase liability trial.

"Secondly, we feel there is no evidence sufficient to support the conclusion that the difference between West Coast freight and actual freight . . . can be a measure of damages. You can't submit a theory to the jury that is not supported by any evidence. My understanding, respectfully, of the law is that in order to ascertain measure of damages the Plaintiff has the burden of proof of showing what the competition price level would have been absent a particular practice in comparing that with what the actual price level was in the presence of the practice." (Vol. 56, Tr. 3572-73; J.A. 204-05.)[16]

Regardless of whether or not the aggrieved party objected or proposed its own instruction on the issue, appellate courts have not hesitated to reverse when trial courts have failed to give any instructions at all on basic legal principles. For example, in *McNello* v. *John B. Kelly, Inc.*, 283 F.2d 96, 102 (3d Cir. 1960), a tort action, the Third Circuit held:

"The question of liability in the present case was submitted to the jury with what was tantamount to no instructions at all. Few more fundamental errors with respect to a charge can be conceived. A holding that counsel's failure to take exception to such a procedure bound his client would, in our opinion, result in a gross miscarriage of justice."[17]

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[16] It is not necessary to propose a specific alternative interrogatory in order to preserve the issue for appeal; it is sufficient to object to the proposed interrogatory prior to its submission to the jury, as petitioners did. *Huddleston* v. *Herman & MacLean*, 640 F.2d 534, 550 (5th Cir.), *modified in part on other grounds*, 650 F.2d 815 (5th Cir. 1981), *cert. granted*, 102 S.Ct. 1766 (1982); *Clappier* v. *Flynn*, 605 F.2d 519, 528 (10th Cir. 1979); *Turchio* v. *D/S A/S Den Norske Africa*, 509 F.2d 101, 105 (2d Cir. 1974).

[17] *See also United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 411-12 (1947) ("The erroneous charge was on a vital phase of the case and affected the substantial rights of the defendants. We have the power to notice a 'plain error' though it is not assigned or specified.").

Here also, "[f]ew more fundamental errors with respect to a charge can be conceived." Given the unusual nature of the alleged conspiracy (involving the fixing of the price of freight alone rather than the total delivered price), the jury's attention naturally must have focused primarily, if not exclusively, upon the "phantom freight" and "underweight" aspects of the price. Once the findings of conspiracy were reached, the jurors easily could have assumed that it was proper automatically to award damages in the full amount of the alleged freight overcharge. In this context, the district court's failure of instruction, combined with its submission of the special interrogatories, was tantamount to leaving the jury "completely at sea concerning the applicable legal standards."[18] The likelihood that the jury based its findings as to measure of damages upon an inadequate understanding of the law unquestionably taints the result. This Court should set aside that result on the ground that plain error was committed below.

D. A Review Of The Evidence Strongly Indicates That The District Court's Errors Misled The Jury, And Were Not Harmless.

As explained in the previous section, the trial court's submission of the special interrogatories, combined with its failure to offer any instructions to the jury on measure of damages, was plain error requiring reversal, regardless of the actual sufficiency of the evidence supporting the measure adopted. This Court thus need not review that evidence to reach its decision. A review of that evidence, however, in light of both fundamental economic principles and factors found significant by other courts in considering damage issues, demonstrates that the procedural errors very likely influenced the verdict, and were not harmless. Certainly, the limited evidence in the record which exists relevant to damages indicates some lesser measure than the *total* amount of the "freight pickup."[19]

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[18] *Landy* v. *FAA*, *supra*, 635 F.2d at 147.

[19] It must be emphasized in any discussion of evidence relating to measure of damages that the petitioners understood that this issue was not being tried, and therefore did not present evidence or examine their expert with this in mind. The respondents apparently also did not believe that damage issues were before the jury. They did not directly question their expert witness on this issue. In their opening statements to the jury, they said

(Footnote continued on following page)

The contrast between the record below and the damage inquiries undertaken in such cases as *Wall Products Co.* v. *National Gypsum Co.*, 357 F.Supp. 832 (N.D.Cal. 1973), is striking. In *Wall Products*, the court recognized (unlike the courts below) that damages had to be based upon the difference between the price paid and the hypothetical competitive price, and noted that this determination was affected by, *inter alia*, the volatile nature of pricing in the gypsum wallboard industry. *Id.* at 836. The court accepted a damage measure based primarily upon the sharp rise in prices at the outset of the conspiracy, together with the sharp drop in prices which occurred following the termination of the conspiracy. Its conclusion was further supported by economic data indicating that the higher prices during the conspiracy could not be explained by normal competition, including, *inter alia:* (1) the defendants' production costs over time, which were lower during the conspiracy period than afterwards; (2) price data showing that wallboard prices continued to drop for several years after the conspiracy; (3) lower utilization of industry capacity during the conspiracy period; and (4) higher demand for wallboard by the construction industry after the conspiracy. *Id.* at 839.

The respondents did not even attempt to present evidence of the primary type relied upon in *Wall Products*—that ply-

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(Footnote continued from preceding page)

that "[y]ou will not be asked at this time to return any specific damage verdicts. That is not your function in this proceeding." Vol. 45, Tr. 88. Indeed, the respondents even proposed an instruction which made it clear that they did not believe damage issues had been tried:

> "In this part of the case, all that you are called upon to decide is whether the defendants did combine to fix prices, or any part of the price they charged; and, second, whether what they did had any influence or effect on that aspect of the price. *You will not now be asked to determine the specific amount of damage suffered by any plaintiff or plaintiffs as a whole, but only whether the acts of defendants did some damage to one or more of the plaintiff class in some amount, however large or small.* If you find that they did combine and there *was any such effect on what the plaintiffs or any of them paid*, then you must find in favor of plaintiffs and against defendants, leaving for further proceedings the specific amount to be determined." (Plaintiffs' Proposed Instruction No. 45, Second Set; emphases added.)

Consequently, very little evidence regarding damages exists in the record; what little does exist was introduced primarily to prove or rebut conspiracy and impact.

wood prices dropped following the alleged conspiracy. On the contrary, the record indicates that delivered prices did *not* drop when the West Coast freight system was abandoned. Vol. 56, Tr. 3168-70. Mill prices necessarily must have risen in order to compensate for the lowered freight rates, just as the Ninth Circuit assumed. 637 F.2d at 580; App. at J-14.[20]

In *Ohio Valley Electric Co.* v. *General Electric Co.*, 244 F.Supp. 914, 935-49 (S.D.N.Y. 1965), the plaintiffs offered a measure of damages theory based upon a comparison of discounts off list price during and after the conspiracy. The court carefully examined the economic conditions prevailing in the electrical equipment industry both during and after the conspiracy, including buyer demand, industry capacity, foreign competition, and government price controls (*id.* at 945), and concluded that the formula for measuring damages proposed by the plaintiffs had to be revised to account for these factors. The court explained:

> "I . . . reject the extreme positions taken by plaintiffs that the wide discrepancy in discounts off book before and after 1959 is wholly due to the end of the conspiracy and by defendants that it is wholly due to a change in the economic climate. The vital question remains to what extent the economic changes from the 1950's to the 1960's account for the radical change in relationship between book and order prices. I am persuaded that the fact, as so frequently is the case, falls somewhere between the two extremes urged by plaintiffs and defendants. In other circumstances, it might be considered rash indeed to attempt to isolate the force of economic determinants on price; even those most learned in the field will agree that such judgments are at best inexact. It is, however, the duty of this court to make just such a determination, and the difficulty of the task does not eliminate the necessity for making it." (*Id.* at 946.)

Economic factors which may have affected plywood pricing during or after the alleged conspiracy were not accounted for by the damage measure adopted, which focused only on the

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[20] *Cf. In re Folding Carton Antitrust Litigation*, 83 F.R.D. 251, 254 (N.D.Ill. 1978) ("[i]f an economically effective price conspiracy takes place over a long period of time and the industry suddenly becomes competitive, then profits and prices are expected to fall").

freight element of pricing. For example, the undisputed evidence that delivered pricing of plywood was volatile and responsive to supply and demand was ignored—indeed, the respondents' expert asserted that supply and demand were *irrelevant* to his analysis. Vol. 53, Tr. 2363-69, 2471; J.A. 322-25, 352-53. This is both bad economics and bad law. As the court recognized in *Ralston* v. *Volkswagonwerk, A.G.*, 61 F.R.D. 427, 432 (W.D.Mo. 1973):

> "[A] realistic measure of damages would necessarily have to take into consideration such variables as the individual's bargaining position, the willingness or unwillingness of each individual dealer or salesman to grant a discount from the suggested retail price, and market conditions which would no doubt vary substantially during the period of time involved in this lawsuit."

The measure of damages found by the jury assumes a constant amount of freight "overcharge" to a buyer for all purchases from a given Southern mill, irrespective of the level of supply or demand. Under the measure adopted, if the amount of "freight gain" (the difference between actual and West Coast freight) on sales to a particular customer was $10, for example, the damages per purchase to that customer are *always* $10, even though the total price paid by that purchaser may have risen or fallen drastically. If the total price dropped from $80 to $70 in one week, damages remain $10 under the respondents' analysis. Moreover, if sales to two customers involved the same alleged "freight gain" of $10, damages to each are an unvarying $10, even though Customer A paid $90 and Customer B bargained the price down to $85. Thus, *damages are computed entirely independently of the total price charged,* and are functions only of geographic location and total quantity of plywood purchased.

In short, the respondents made no attempt to introduce evidence of the type commonly relied upon to prove measure of damages in price-fixing cases; they rely most heavily (as did the Fifth Circuit) upon the testimony of their economic expert, Richard Barber. Although they now claim that their expert testified that the West Coast freight system "resulted in increased prices in the measure of damages found by the jury" (Resp. Opp. to Pet. for Cert., p. 11), review of his testimony shows that he never directly addressed this issue. Vol. 56, Tr.

2344-73. In fact, Mr. Barber was never asked the ultimate question upon which the measure of damages must depend: what would the total "competitive" price of plywood have been throughout the damage period but for the defendants' pricing system? Mr. Barber conceded that at the time of the formation of the Southern plywood industry, it was reasonable for Southern delivered prices to have approximated Western delivered prices, but he contended that as Southern output increased, the Southern freight advantage should have been bargained away over some *unspecified* period of time. *See* Vol. 56, Tr. 2405, 2467, 2470-71; J.A. 327, 350-53. The actual date by which the freight gain should have "evaporated," so that all of the freight advantage accrued to the buyer instead of the seller, was not fixed with reference to the damage period.

Even if Mr. Barber's testimony (which was never directed to measure of damages, but merely to proving conspiracy and impact) could somehow be construed to support the measure of damages adopted by the jury, such testimony is no better than the facts upon which it was based. Any expert's opinion based upon assumptions cannot stand unless the assumptions are supported in the record; an expert's opinion should be disregarded if it fails to account for factors which obviously bear upon the result.[21]

The jury's finding on the measure of damages also cannot be reconciled with the Ninth Circuit's decision in *Boise Cascade Corp.* v. *FTC*, 637 F.2d 573 (9th Cir. 1980). There, the Ninth Circuit refused to enforce an FTC order directing petitioners to cease and desist the same pricing practices at issue here, because the Commission had not demonstrated "that the challenged pricing system actually had the effect of fixing or stabilizing prices." *Id.* at 577. The Commission failed to refute the presumption that had "actual" rather than West Coast freight been quoted, the plywood manufacturers simply would

[21] *See, e.g., Murphy Tugboat Co.* v. *Crowley*, 658 F.2d 1256, 1261-63 (9th Cir. 1981), *cert. denied*, 102 S.Ct. 1713 (1982); *Merit Motors, Inc.* v. *Chrysler Motors Corp.*, 569 F.2d 666, 672-73 (D.C. Cir. 1977); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 85-89 (9th Cir. 1969), *cert. denied*, 369 U.S. 1062 (1970); *Herman Schwabe, Inc.* v. *United Shoe Mach. Corp.*, 297 F.2d 906, 911-12 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962); *American Bearing Co.* v. *Litton Indus., Inc.*, 1982-2 CCH Trade Cas. ¶64,778 at 71,817-72 (E.D.Pa. 1982); *Cecil Corley Motor Co.* v. *General Motors Corp.*, 380 F.Supp. 819, 854-58 (M.D.Tenn. 1974).

have raised their mill prices by a corresponding amount so that the individual total delivered prices would have remained constant:

> "The Commission has cited no evidence that tends to disprove *the common-sense proposition that southern producers would simply adjust the index* [mill] *price upwards if they were quoting delivered prices in terms of actual freight.*" (*Id.* at 580; App. at J-14; emphasis added.)

The Fifth and the Ninth Circuits have reached conflicting results on the issue of whether the freight pricing system adopted by the industry had an effect on the total price ultimately paid by plywood purchasers. But the conflict between the courts of appeal is far deeper than a mere disagreement over a particular factual issue. The trial court below failed to instruct the jury to consider the very principle which the Ninth Circuit found dispositive: the probability that plywood sellers would raise their mill price to correspond to a hypothetical decrease in the freight price.

Two fact-finders considering the same evidence may come to conflicting results because they have drawn different conclusions from the same facts. But that is not what happened here. The differing results flow not from different inferences drawn by different fact-finders, but because one of the two fact-finders—the jury in the proceedings below—was not given a correct legal standard against which to measure the evidence.

Even if there were only a small doubt that the verdict would have differed had a proper instruction been given, the result below should not stand. As Justice Rutledge explained in *Kotteakos* v. *United States,* 328 U.S. 750, 765-66 (1946):

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. *The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected*

by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." (Citation omitted, emphasis added.)[22]

The Fifth Circuit's cursory analysis of the damage question—that "[t]he jury chose to accept the testimony of plaintiffs' economist and to reject the contrary testimony of defendants' economist" (655 F.2d at 635; App. at A-11)— thus misses the point. The issue does not depend upon the jury's belief as to the relative credibility of the parties' experts. The respondents' expert did not consider any factor other than freight, and the district court's interrogatories, coupled with its failure to instruct, make it extremely unlikely that the jury considered any other factor. Moreover, regardless of whether the evidence in the record would have independently supported the jury's finding, the result is still improper because it is the product of fundamental errors by the district court—based upon consideration of only one element of the price, and reached without any guidance on the applicable law. Had the jury been correctly instructed, it very likely would have reached a different conclusion. Therefore, it cannot be doubted that the errors "had substantial influence." *Kotteakos* v. *United States, supra,* 328 U.S. at 766.

Apart from the jury's presumed reliance upon the testimony of the respondents' expert, the only other explanation offered by the Fifth Circuit to support the district court's measure of damages was the "traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury." *J. Truett Payne Co.* v. *Chrysler Motors Corp., supra,* 451 U.S. at 565. The court of appeals cited its prior decision which held that if the fact of damage is shown, proof of losses which border on the speculative is allowed in order to facilitate the policies of the antitrust laws. 655 F.2d at 635; App. at A-10,

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[22] Professors Wright and Miller have noted that although *Kotteakos* was a criminal case, its reasoning should be equally applicable to civil litigation. 11 C. Wright & A. Miller, *supra,* §2883, p. 276.

Former Chief Justice Traynor of the California Supreme Court has urged, with regard to substantial errors by trial courts, that "[u]nless the appellate court believes it highly probable that the error did not affect the judgment, it should reverse." R. Traynor, *The Riddle of Harmless Error,* p. 35 (1970).

citing Hobart Bros. Co. v. *Malcolm T. Gilliland, Inc.* 471 F.2d 894, 903 (5th Cir.), *cert. denied,* 412 U.S. 923 (1973).

This tacit acceptance by the court of appeals of a measure of damages which admittedly borders on speculation is profoundly disturbing, especially since that measure differs so drastically from the Ninth Circuit's view of the economic effect of the challenged practices. The petitioner recognizes this Court's longstanding admonition that a distinction exists "between the measure of proof necessary to establish the fact [of] some damage, and the measure of proof necessary to enable the jury to fix the amount." *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U.S. 555, 562 (1931). Nevertheless, "even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork." *Bigelow* v. *RKO Radio Pictures, Inc., supra,* 327 U.S. at 264 (1946).

Moreover, in the 36 years since *Bigelow,* when this Court last fully addressed the standards for measuring damages in antitrust price-fixing cases, private antitrust litigation has significantly expanded, spurred especially by the advent of Rule 23 of the Federal Rules of Civil Procedure. *See Reiter* v. *Sonotone Corp., supra,* 442 U.S. at 343 n. 6. In view of the procedural short cuts which allow for class-wide proof of impact and encourage class-wide damage formulas, it is particularly important that the measurement of damages in class actions reflects, as accurately as possible, the actual injury suffered by class members. The staggering amounts typically at stake in such cases call for, at a minimum, the most accurate measure reasonably possible—one which at least considers all elements of the price. The policies that liability should not go unpunished, and that it "does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted" (*J. Truett Payne Co.* v. *Chrysler Motors Corp., supra,* 451 U.S. at 566-67), are rightfully strong. However, particularly in class actions such as this, these policies do not justify the substitution of speculative, incomplete theories in place of proof which reasonably relates damages awarded to actual injury suffered.

The issue presented here is simply whether a verdict may be rendered by a jury which has never been instructed to

consider the applicable legal standard governing antitrust damages, and whose consideration of the question of damages was framed by interrogatories which improperly singled out one element affecting price (the difference between West Coast freight or freight computed according to standard weights and actual freight) without requiring or even inviting consideration of other relevant factors. No verdict of any size—let alone one of this potential magnitude—should be based on such a procedure, and the Fifth Circuit's decision to the contrary should be reversed.

II.

THE JUDGMENT ON THE JURY'S FINDINGS OF CONSPIRACY MUST BE REVERSED.

A. Introduction.

The conspiracy issues presented in these cases are discussed in detail in the brief of Petitioners Weyerhaeuser Company and Willamette Industries, Inc. Petitioner Georgia-Pacific fully agrees with that discussion and adopts it by reference. The discussion in this brief is therefore limited to certain key aspects of the conspiracy argument—aspects that become especially critical because they arise in a class action context.

As noted above in Section I.B of the Statement of the Case, in recent years four factors—trebled damages, joint and several liability, the class action device under amended Rule 23 and the denial of contribution—have combined to produce a vast expansion of the potential liability of defendants in private antitrust cases. The problem is exacerbated by confusion and uncertainty concerning the legal standards for proving an antitrust conspiracy.

This Court's leading decisions on this general subject predate the proliferation of antitrust class actions that occurred following the 1966 amendments to Rule 23. In *Theatre Enterprises, Inc.* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954), this Court ruled that a plaintiff alleging a conspiracy to restrain trade in violation of Section 1 of the Sherman Act is not entitled to a directed verdict if all that is shown is consciously parallel conduct by the defendants. In *First Nat'l Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968), the Court

ruled that the defendants in a case where such a conspiracy is alleged are entitled to summary judgment if all the plaintiff has established is parallel action which was not contrary to the independent business interests of each alleged co-conspirator. In neither case did the Court reach the question of what proof in addition to parallel conduct is necessary to support a finding of conspiracy. The Court also did not decide what types of communications among alleged co-conspirators (in a case where such communications constitute the only proof in addition to parallel conduct) are necessary to establish liability. The errors committed by the courts below squarely present these questions to this Court.

The *first* error committed was the submission of the case to the jury on instructions which permitted it to infer an unlawful agreement in restraint of trade solely from evidence that: (1) most of the defendants utilized West Coast freight and standard weights; and (2) *some* of the defendants communicated at times with one another with respect to various matters, occasionally mentioning West Coast freight, but never even mentioning standard weights. The district court offered no limiting instructions advising the jury that parallel conduct and contacts providing merely an opportunity to conspire are insufficient to prove an agreement.

The *second* error committed was the Fifth Circuit's affirmance of the jury's verdict on the basis of evidence of parallel conduct and communications among competitors which afford, at most, a mere opportunity to conspire. The Fifth Circuit's understanding of the law is inconsistent with decisions of numerous other courts. As will be demonstrated in subsection C.1 below, other courts have ruled that a conspiracy may not be inferred from proof of parallel conduct consistent with the independent business interest of each alleged co-conspirator, coupled with communications among competitors which provide no more than an opportunity to conspire. Nevertheless, the Fifth Circuit relied on exactly this type of evidence in upholding the jury's finding of conspiracy.

The *third* error committed was that both courts below upheld the verdict of the jury connecting the thirty settled defendants in this case to the conspiracies alleged among the three trial defendants. The evidence against these alleged co-

conspirators was limited to conscious parallelism alone. This ruling is unprecedented and inconsistent with the decision of this Court in *Cities Service.*

B. The Trial Court Erred In Instructing The Jury Concerning What Types Of Evidence Are Sufficient To Establish A Conspiracy.

The district court instructed the jury that, while matters such as parallel conduct, or evidence of meetings among competitors, or attendance at trade association gatherings, or long-term purchase contracts between competitors were not illegal in themselves, each could, individually and when coupled with other evidence, support a finding of a conspiracy to restrain trade. Some excerpts will suffice to convey the character of these instructions:

> "There has been evidence of manufacturers talking with one another, obtaining pricing information from one another, buying from one another, including long-term contracts. These practices, these transactions, these contacts in and of themselves are not illegal. Indeed, they may be vehicles for fostering competition. At the same time, *such matters may be conduct that, when viewed on their own and in the light of the other evidence, indicate that there were agreements,* expressed or implied, reached between manufacturers that they would use in selling plywood to others West Coast freight or standard weights. In short, although you should understand that, when one manufacturer buys from another that is a contract, that contract in and of itself is not a violation of the Sherman Antitrust law unless that contract involves and places a requirement that there will be in the resale of that product the use of West Coast Freight and standard weights.
>
> "Now, the fact that manufacturers attended trade meetings, participated in trade discussions, likewise, in and of itself is not illegal under the Sherman Antitrust Act and, indeed, may be evidence or a means for fostering competition. *On the other hand, such evidence is evidence that there was some opportunity for persons to have agreed or to have gotten together to assure that some previously agreed upon matter was being carried out* .... [T]he mere fact that there be an opportunity to meet or to agree does not

mean that any particular agreement was or was not entered. It is merely one part of the total of the circumstantial evidence that you will be dealing with.

* * *

"[T]he fact that many or all manufacturers were to adopt the same or similar practices would not in and of itself mean that there was a conspiracy to do so. This would be true even if it were shown that they all did so knowing that others were following similar practices. *On the other hand, where it be a fact that similar practices are being followed by many manufacturers, with each being aware that the other is doing so, that is part of the circumstantial evidence from which a jury may, with other evidence in the case, look to see whether this was so because of some agreement to do so.*" (Vol. 56, Tr. 3536-38, 3539-40; J.A. 184-87 (emphases added).)

Thus, the jury was permitted to infer a conspiracy from parallel practices and contacts among competitors where it was shown only that they had opportunities to conspire—*and nothing more.* Indeed, the jury was informed that "manufacturers talking with one another, obtaining pricing from one another, [or] buying from one another . . . *viewed on their own and in the light of other evidence*" would be sufficient evidence of agreement. The error inherent in this instruction was further compounded because, while the jury was told that these and other practices can be considered as part of the totality of the evidence, it was *not* told that mere parallelism and contacts providing only opportunities to conspire do not, without more, legally support a finding of agreement.

Indeed, *no* limiting instructions of any kind were given to the jury on the proper inferences to be drawn from a showing of nothing more than parallel action, coupled with opportunity contacts. The jury was simply told of a variety of evidentiary items that it *could* consider, such as whether there existed intercompetitor sales agreements which used West Coast freight or standard weights, whether the parallel pricing practice "made sense in light of the economic industry conditions," and whether "the benefits from those practices, continuation of those practices, were or were not dependent on . . . other manufacturers doing the same thing." Vol. 56, Tr. 3540; J.A.

187. However, these factors were not identified as limitations or conditions upon a finding of liability, but only as permissible subjects of jury consideration. *Thus, the jury remained free to return a verdict of liability even if none of these other factors were found applicable and it found nothing more than parallel pricing behavior, coupled only with communications which provided no more than an opportunity to conspire.*

The petitioners objected to these instructions at trial. Vol. 56, Tr. 3574-78, J.A. 206-08. They also tendered proposed instructions which would have clarified the issue of what inferences can be drawn from a showing of no more than parallel conduct or communications among competitors amounting to no more than intelligence gathering on a variety of subjects (occasionally including West Coast freight), but the district court declined to adopt them or to offer any alternative instructions of its own.[23] As is explained in Section II.C.2, below, these two types of evidence together will not, without more, justify a finding of conspiracy. Because the instructions that were given invited the jury to find a conspiracy on the basis of legally insufficient evidence, and because the district court failed to give any limiting instructions informing the jury of the evidentiary weight to be accorded proof of no more than parallel conduct plus such opportunity evidence, this Court should therefore reverse the jury's verdict, *even assuming*

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[23] Defendants' Proposed Supplemental Instructions Nos. 4 (purchase contracts among competitors are not evidence of conspiracy); 5 (similar business practices are not evidence of conspiracy unless there was no good business reason served by engaging in such practices); 8 (by themselves, meetings among competitors are not evidence of conspiracy); 8(a) (where there was no evidence of what competitors said at a meeting, the jury cannot infer that something unlawful occurred and the meeting cannot be a basis for any finding against a defendant); 8(b) (where there is evidence of what competitors said at a meeting and it is indicative of a lawful or legitimate business purpose, the meeting cannot be relied upon as evidence of conspiracy). *See* J.A. 156-59. The objections to the district court's instructions were reiterated at pages 62-63 of the petitioners' opening brief to the Fifth Circuit.

In lieu of accepting any of the petitioners' proposed instructions, the district court simply could have offered its own clarifying comment to the jury. Such an instruction could have been as follows: "As I explained before, parallel conduct and contacts among competitors which provide no more than an opportunity to conspire are not in themselves, individually or together,

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arguendo that there was evidence to sustain the same verdict, had the jury been properly instructed. As was stated in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19 (1962), where this Court reversed a jury finding of conspiracy because the district court had given improper instructions with respect to one of several alternative theories of liability:

> "Since we hold erroneous one theory of liability upon which the general verdict may have rested—a conspiracy among petitioners and Exchange Lemon—it is unnecessary for us to explore the legality of the other theories. As was stated of a general verdict in Maryland v. Baldwin, 112 U.S. 490, 493 ... (1884), '[I]ts generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld * * *.' " (370 U.S. at 29-30.)[24]

Here also, even assuming that there was sufficient evidence apart from parallel conduct and communications between competitors providing no more than a mere opportunity to conspire, reversal is necessary because the jury, due to the district court's failure of instruction, may have nonetheless relied only on those two types of evidence.

C. The Fifth Circuit Erred In Upholding The Judgment On The Jury's Verdict Of Conspiracy.

The Fifth Circuit erred in ruling that the evidence was sufficient to support the jury's verdict of a conspiracy among the trial defendants. The appellate court's error is underscored by a

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illegal, but may constitute evidence which, along with other evidence, supports an inference of conspiracy. However, these two items (that is, parallel conduct and the types of contacts described previously) taken separately or in conjunction with each other, cannot, without more evidence, support such an inference."

[24] Numerous other courts in antitrust or trade regulation cases have applied this rule in reversing jury verdicts or district court judgments. *See, e.g., Borger* v. *Yamaha Int'l Corp.*, 625 F.2d 390, 398 (2d Cir. 1980); *E. I. du Pont de Nemours & Co.* v. *Berkley & Co., Inc.*, 620 F.2d 1247, 1256-57 (8th Cir. 1980); *Hayes* v. *Solomon*, 597 F.2d 958, 985-86 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 82 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459, 465 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

consideration of the rulings of this Court and of other lower courts on the issue of what proof is legally sufficient to establish a conspiracy.

1. *The Fifth Circuit's Opinion Contrasted With The Law Of Other Courts.* The court of appeals upheld the jury's verdict on the basis of a record consisting of two primary types of evidence: (1) parallel behavior among plywood manufacturers in the use of West Coast freight and standard weights; and (2) occasional communications between the petitioner, its co-defendants at trial, and a few other producers, some of which involved certain aspects of pricing. The evidence did not show that the so-called conspirators ever even mentioned standard weights, or that they discussed in detail (or conspired concerning) West Coast freight. On this record, the Fifth Circuit applied the following legal standard in determining whether the evidence was sufficient to support the jury's finding of conspiracy:

> "The parallel pricing conduct clearly demonstrated in the record plus the numerous items of direct evidence of communication between high-level personnel on pricing policy adequately support the jury's verdict." (655 F.2d at 634; App. at A-9.)

This statement by the court of appeals mischaracterizes the evidence. There were no discussions among the defendants' personnel on "pricing policy." There were, at most, a few instances where those personnel had contacts with each other and one of them mentioned briefly the way in which a company priced its plywood in general. Even more importantly, however, the standard adopted by the Fifth Circuit in determining whether the evidence was sufficient to support the jury's finding of conspiracy is contrary to prevailing principles of law.

This Court held in *Cities Service* that parallel conduct which is in the independent business interest of each alleged co-conspirator will not support an inference of agreement. 391 U.S. at 287. It distinguished on this basis its prior opinion in *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208 (1939), stating that the parallel conduct there would not have been undertaken independently by each of the defendant distributors, but "that the imposition of the [challenged parallel practices] would be feasible if adhered to by all distributors." 391 U.S. at 287.

The Court in *Cities Service* did not reach the question of the probative value in an antitrust conspiracy case of parallel conduct, plus communications among competitors which afford no more than an opportunity to conspire. However, the Second, Third, Seventh, Eighth, Ninth, Tenth and District of Columbia Circuits, in addition to numerous district courts, have addressed this issue and have held that parallel conduct and such "opportunity evidence" will not suffice to establish a conspiracy. The lower courts have so ruled where the opportunity evidence consisted of contacts among competitors and the plaintiff could only prove the mere physical possibility of discussion, but could not prove that discussions concerning the subject matter of the alleged conspiracy took place.[25] The lower courts have also ruled that opportunity evidence consisting of contacts among competitors where the subject matter of the alleged conspiracy was discussed will not suffice to establish a conspiracy, where those discussions constituted no more than attempts by rivals to learn about each other's business activities.[26] These decisions establish basic guideposts for weighing the probative value of certain types of circumstantial evidence in antitrust conspiracy cases. As will be shown in the subsection that follows, the Fifth Circuit ignored those guideposts when it upheld the jury's verdict of conspiracy in these cases.

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[25] *Proctor* v. *State Farm Mut. Auto Ins. Co.*, 675 F.2d 308, 329-30 (D.C.Cir. 1982), *petition for cert. pending* (No. 81-2379); *Tose* v. *First Penn. Bank, N.A.*, 648 F.2d 879, 894-95 (3d Cir.), *cert. denied*, 102 S.Ct. 390 (1981); *Oreck Corp.* v. *Whirlpool Corp.*, 639 F.2d 75, 79-80 (2d Cir. 1980), *cert. denied*, 102 S.Ct. 639 (1981); *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 513 F.Supp. 1100, 1149, 1208 (E.D.Pa. 1981); *Schoenkopf* v. *Brown & Williamson Tobacco Corp.*, 483 F.Supp. 1185, 1189-92 (E.D.Pa.), *aff'd*, 637 F.2d 205 (3d Cir. 1980); *Universal Lite Distribs., Inc.* v. *Northwest Indus., Inc.*, 452 F.Supp. 1206, 1217 (D.Md. 1978), *modified*, 602 F.2d 1173 (4th Cir. 1979); *Harlem River Consumers' Co-op, Inc.* v. *Associated Growers of Harlem*, 408 F.Supp. 1251, 1276 (S.D.N.Y. 1976); *United States* v. *General Motors Corp.*, 1974-2 CCH Trade Cas. ¶75,253 at 97,667-71 (E.D.Mich. 1974); *Overseas Motors, Inc.* v. *Import Motors, Ltd.*, 375 F.Supp. 499, 535 (E.D.Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975); *United Shoppers Exclusive* v. *Broadway-Hale Stores, Inc.*, 1966 CCH Trade Cas. ¶71,727 at 82,271-72 (N.D.Cal. 1965).

[26] *Weit* v. *Continental Ill. Nat'l Bank & Trust Co.*, 641 F.2d 457, 462-65 (7th Cir. 1981), *cert. denied*, 102 S.Ct. 1610 (1982); *Venzie Corp.* v. *United*

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2. *Summary Of Evidence And Need For Reversal By This Court.* The record in these cases established only that: (1) the petitioners and many (but not all) of the defendants who settled before trial used standard weights and West Coast freight and (2) the petitioners and some (but not most) of those settled defendants occasionally communicated with each other on a variety of topics, infrequently including West Coast freight, but never including standard weights.[27] On the basis of the decisions summarized in the preceding subsection, the Fifth Circuit should have held that these types of evidence will not support a finding of conspiracy. Its failure to do so therefore constitutes reversible error.

With respect to the conspiracy to use standard weights, all that the respondents showed was the parallel use of such weights by many plywood manufacturers, and occasional contacts between representatives of those manufacturers, which provided the opportunity to discuss the use of those weights. The respondents were not able to show, however, that such

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States Mineral Prods. Co., 521 F.2d 1309, 1312-13 (3d Cir. 1975); *Cole* v. *Hughes Tool Co.*, 215 F.2d 924, 940-41 (10th Cir. 1954), *cert. denied*, 348 U.S. 927 (1955) (*rev'g Hughes Tool Co.* v. *Ford*, 114 F.Supp. 525, 541-42 & n. 70 (E.D.Okla. 1953)); *Pevely Dairy Co.* v. *United States*, 178 F.2d 363, 368-69 (8th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950); *In Re Folding Carton Antitrust Litigation (Dean Foods Co.* v. *Alton Box Bd. Co.)*, 1980-2 CCH Trade Cas. ¶63,460 at 76,431-32 (N.D.Ill. 1980); *Hunt* v. *Mobil Oil Corp.*, 465 F.Supp. 195, 230-31 (S.D.N.Y. 1978), *aff'd*, 610 F.2d 806 (2d Cir. 1979); *Murphy* v. *Alpha Realty, Inc.*, 1978-2 CCH Trade Cas. ¶62,388 at 76,310-11 (N.D.Ill. 1978); *United States* v. *Ward Baking Co.*, 243 F.Supp. 713, 715-17 (E.D.Pa. 1965); *United States* v. *Eli Lilly & Co.*, 1959 CCH Trade Cas. ¶69,536 at 76,136-38, 76-154 (D.N.J. 1959); *United States* v. *Borden Co.*, 111 F.Supp. 562, 567-69, 572-73, 575, 578-80 (N.D.Ill. 1953), *aff'd in pertinent part*, 347 U.S. 514 (1954).

[27] The respondents would undoubtedly claim that there are two other types of evidence establishing the alleged conspiracies: the testimony of their expert witness, Mr. Richard Barber, and the fact that many manufacturers contracted to buy and sell plywood to each other.

The testimony of Mr. Barber does not aid their case at all, however. If an expert testifies that a particular practice is conspiratorial and a reviewing court concludes that the evidence does not justify an inference of conspiracy, the expert's opinion will not prevent a judgment in favor of the defendant. *United States* v. *United States Steel Corp.*, 251 U.S. 417, 448-49 (1920); *Weit* v. *Continental Ill. Nat'l. Bank & Trust Co.*, 641 F.2d 457, 461-62 (7th Cir. 1981), *cert. denied*, 102 S.Ct. 1610 (1982); *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 505 F.Supp. 1313, 1379-80 (E.D.Pa. 1981).

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discussions actually occurred.[28] The petitioners, on the other hand, demonstrated that the utilization of standard weights was a long-standing, traditional marketing method, dating from the period when the technology of plywood production was less advanced (Vol. 45, Tr. 251), and that the practice facilitated negotiations with customers on the mill price of plywood. *Id.*, Tr. Tr. 247; Vol. 49, Tr. 1364-65; PX 706 (Vol. 52, Tr. 2054-55). Thus, the use of such weights was clearly in the independent business interest of each plywood manufacturer; the petitioners' expert so testified. Vol. 55, Tr. 2943; J.A. 368. The Federal Trade Commission also found the practice to be non-collusive. 91 F.T.C. at 102. The mere fact that parallel conduct was coupled with a few contacts among competitors, during which the subject of standard weights was never mentioned, does not support a finding of conspiracy, as the precedents discussed in the previous subsection indicate.

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Intercompetitor sales contracts also are not probative evidence of conspiracy. One would expect such contracts, because vertically integrated manufacturers (*i.e.*, those operating their own retail or wholesale distribution facilities) frequently purchased plywood from other manufacturers in order to satisfy customer demands. Vols. 46, 47, 52, Tr. 483, 554, 2095. Although these contracts may have had West Coast freight or freight computed according to standard weights as an element of the purchase price, they did not compel the purchaser to resell on that basis. And the mere fact of contractual relationships among competitors has been held insufficient to support a finding of conspiracy. *See, e.g., Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 513 F.Supp. 1100, 1155 & n. 66 (E.D.Pa. 1981); *In re Folding Carton Antitrust Litigation (Dean Foods Co.* v. *Alton Box Bd. Co.)*, 1980-2 CCH Trade Cas. ¶63,460 at 76,431 (N.D.Ill. 1980); *Tose* v. *First Penn. Bank, N. A.*, 492 F.Supp. 246, 257 (E.D.Pa. 1980), *aff'd*, 648 F.2d 879, 896 (3d Cir.), *cert. denied*, 102 S.Ct. 390 (1981); *United States* v. *Westinghouse Elec. Corp.*, 471 F.Supp. 532, 537-39 (N.D.Cal. 1978), *modified on other grounds*, 648 F.2d 642 (9th Cir. 1981); *Thomas* v. *Amerada Hess Corp.*, 393 F.Supp. 58, 72 (M.D.Pa. 1975).

[28] The respondents at page 8 of their brief in opposition to the petitions for certiorari cited certain trial testimony for the proposition that the petitioners "agreed on" the use of standard weights in the pricing of plywood. Vols. 45, 47, 50, Tr. 247-50, 565-69, 1692-93, 1711. This misstates the record. The cited testimony does not indicate that there was any agreement among the plywood manufacturers to use standard weights at any time; it at most indicates that one or more of the manufacturers may have agreed with either the Office of Price Administration during World War II or the Office of Price Stabilization during the Korean conflict to reinstitute uniform weight tables which would facilitate price control regulations.

The respondents relied upon largely the same types of evidence to establish the alleged conspiracy to use West Coast freight. The only difference was that there were a very few occasions when some of the manufacturers' representatives communicated with each other on that topic. As before, however, the parallel use of such freight was easily explainable; customers preferred quotations incorporating West Coast freight since it too facilitated the comparison of competing producers' mill prices. Accordingly, the petitioners' expert found that the use of such freight was in the independent business interest of each alleged co-conspirator (Vol. 55, Tr. 2943-46; J.A. 368-70), and the Ninth Circuit agreed (637 F.2d at 578, 579-80; App. at J-10 to J-11, J-13 to J-14).

The other item of evidence relied on by the respondents to prove a West Coast freight conspiracy consisted of various memoranda by or letters between representatives of some of the manufacturers. These documents detailed efforts by those representatives to learn about the business activities of rivals. However, the vast majority of them, including five of the six cited by the Fifth Circuit (PX 29, 174, 175, 180, 182 (J.A. 388, 398-407; Vols. 46, 52, Tr. 346-48, 364-67, 419-21, 2193), *cited in* 655 F.2d at 633-34; App. at A-6 to A-8), do not involve contacts between personnel of competitors; they instead involve attempts by a given company to obtain intelligence about a rival by communicating with that given company's *own employees,* its *customers,* the *ex-employees* of a competitor, or by scrutinizing public announcements in the trade press. This type of "commercial espionage" or "industrial surveillance" is exactly what one would expect of companies trying to obtain a competitive advantage over one another. *Superturf, Inc.* v. *Monsanto Co.,* 660 F.2d 1275, 1281-82 (8th Cir. 1981).

It is true that a few other documents do disclose contacts among the employees of competitors, but the discussions revealed in those documents rarely involved freight in general or West Coast freight in particular. Most dealt with wholly unrelated topics. Three or four documents in the record (apart from sales contracts between companies and correspondence relating thereto) disciosed instances where personnel from competitors contacted each other and mentioned, in passing, freight or subjects relating to freight. But those contacts also

constitute no more than normal intelligence gathering of the type found in all American industries, and such mere "idle shop talk" will not support a finding of conspiracy. *Workman* v. *State Farm Mut. Auto Ins. Co.*, 520 F.Supp. 610, 619 (N.D.Cal.1981). The fact that companies scrutinize the decisions of competitors to use F.O.B. mill pricing (PX 10 (J.A. 385), 342 (Vols. 47, 51, Tr. 773, 1860-62)), or that their employees engage in casual conversation at an American Plywood Association meeting, during which one person mentions that his employer prices plywood on an "F.O.B. mill plus freight" basis (PX 183 (Vol. 46, Tr. 435-37)). does not establish any agreement to restrain trade. Indeed, those who collude would presumably have no need to engage in such information gathering, since they would already be well aware of the actions of their alleged co-conspirators.[29]

In short, the evidence of communications with respect to the alleged West Coast freight conspiracy consitutes opportunity evidence which, when coupled with parallel conduct, will not support the finding of an agreement to restrain trade. It is instead the type of normal intelligence gathering that one would expect to find in a competitive industry. Numerous courts have held that even routine or systematic scrutiny of the business activities of rivals is not impermissible, and will not support an inference of conspiracy; on at least two occasions, this Court has affirmed such rulings.[30] Consequently, if this Court allows the decision of the Fifth Circuit to stand, what the

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[29] These cases are thus quite unlike *Gainesville Utils. Dept.* v. *Florida Power & Light Co.*, 573 F.2d 292 (5th Cir.), *cert. denied*, 439 U.S. 966 (1978), upon which the Fifth Circuit relied. 655 F.2d at 634, App. at A-9. In *Gainesville*, the evidence consisted of parallel refusals to deal plus communications between the alleged conspirators which "border[ed] on a blatant agreement to divide the market." 573 F.2d at 301.

[30] *See, e.g., Proctor* v. *State Farm Mut. Auto. Ins. Co.*, 675 F.2d 308, 329-30 (D.C.Cir. 1982), *petition for cert. pending* (No. 81-2379); *Pevely Dairy Co.* v. *United States*, 178 F.2d 363, 368-69 (8th Cir. 1949), *cert denied*, 339 U.S. 942 (1950); *Tag Mfrs.' Institute* v. *FTC*, 174 F.2d 452, 462-65 (1st Cir. 1949); *National Automobile Brokers' Corp.* v. *General Motors Corp.*, 1976-2 CCH Trade Cas. ¶61,211 at 70,514 (S.D.N.Y. 1976), *aff'd per curiam*, 572 F.2d 953 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *United States* v. *National Malleable & Steel Castings Co.*, 1957 CCH Trade Cas. ¶68,890 at 73,596-97 (N.D. Ohio 1957), *aff'd per curiam*, 358 U.S. 38 (1958); *United States* v. *Borden Co.*, 111 F.Supp. 562, 567-69, 572-76, 578-80 (N.D. Ill. 1953), *aff'd in pertinent part*, 347 U.S. 514 (1954).

Ninth Circuit feared might occur will have come about: a blurring of the "distinction between guilty and innocent commercial behavior." 637 F.2d at 582; App. at J-18. If that distinction is important to maintain in a case where the federal government is seeking only future injunctive relief, it is far more important to maintain in a case like this one, where private plaintiffs seek huge treble damage recoveries from three companies which cannot obtain contribution from their alleged co-conspirators.

D. The Courts Below Erred In Connecting Absent Parties To The Alleged Conspiracy Found Among The Trial Defendants On The Basis Of Nothing More Than Parallel Conduct.

As noted previously, the jury found that the three trial defendants—each of whom produced plywood in both the South and the West—participated in two distinct conspiracies, one involving the use of West Coast freight and the other involving the use of standard weights. The jury also concluded that each of the thirty defendants who settled prior to trial was a participant in one or both of these conspiracies. Thus, it found that the conspiracy to use West Coast freight was undertaken by the three trial defendants and other "Southern Pine Plywood Manufacturers," *i.e.*, sixteen of the settled defendants.[31] Jury Verdict, ¶ 1(b); App. I-2. Similarly, the jury found that the conspiracy to use standard weights in the pricing of Western fir plywood was undertaken by the three trial defendants and "all other manufacturers of softwood plywood," *i.e.*, the sixteen settled defendants mentioned above and fourteen others who had manufacturing facilities only in the West.[32] *Id.*, ¶ 3(b); App. I-3.

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[31] Of these sixteen settled defendants, eleven produced plywood only in the South (Anthony Forest Products; Arkla Chemical Corp.; Dixon Lumber Co.; Kirby Lumber Co.; MacMillan-Bloedel, Inc.; Olinkraft, Inc.; Owens-Illinois, Inc.; Scotch Plywood Co.; Temple Industries, Inc.; Tremont Lumber Co.; and Union Camp Corp.), while five others produced plywood in both the South and the West (Boise Cascade Corp.; Champion International Corp. (U.S. Plywood); International Paper Co.; Louisiana-Pacific Corp.; and Vancouver Plywood Co.).

[32] These fourteen other companies are: American Can Co.; Bohemia, Inc.; Columbia Plywood Corp.; Evans Products Co.; Fibreboard Corp.; Medford Corp.; Plum Creek Lumber Co.; Pope & Talbot, Inc.; Potlatch Corp.; Rosboro Lumber Co.; St. Regis Paper Co.; Simpson Timber Co.; The Pacific Lumber Co.; and Vanply, Inc.

As a result of these findings, the respondents are seeking to hold the petitioners liable for what may be hundreds of millions of dollars of treble damages assessed on purchases by class members from these thirty settled defendants. The district court has denied the petitioners any right to claim reduction (App. at B-6 to B-7) and, pursuant to this Court's decision in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981), they are not entitled to contribution. Therefore, it becomes especially vital to determine whether there was sufficient evidence to link each of these settled defendants to either of the conspiracies found by the jury. The district court ruled that there was; the record reveals otherwise. The Court should take this opportunity to reject the use of the loose evidentiary standards for determining such a link that were applied by the district court in these cases.

1. *The District Court's Ruling.* In response to the defendants' motion for a judgment *n.o.v.* or new trial, the district court ruled that there had been sufficient evidence to connect the settled defendants to the alleged conspiracies, relying on the "slight evidence rule"—the rule that once a conspiracy is established between two or more defendants, it requires only "slight evidence" to connect an additional defendant to that conspiracy. The district court held that *consciously parallel conduct in itself* could constitute the requisite slight evidence:

> "A more difficult problem is presented by the challenge to the jury's findings that all other manufacturers of softwood plywood were co-conspirators, a matter which is important in determining the extent of liability of the three defendants. While evidence and stipulations were presented to tie many of these other manufacturers to the conspiracies, the jury's findings are broad enough to encompass other manufacturers whose individual practices were not the subject of particularized evidence or stipulations. However, there was evidence during the trial of a more general nature, to the effect that the challenged practices were industry-wide in scope and were employed by all manufacturers. The defendants did not choose to dispute at trial these broad assertions with evidence showing variations from the industry norm by any of these other manufacturers.

> "The principle is well established in criminal cases that, once a conspiracy is sufficiently established, only slight evidence is required to support a jury finding that a particular co-conspirator is connected with it .... *This doctrine should hardly be less appropriate when, in a civil case, the question arises in the context not even of determining whether responsibility should be placed on a 'slightly connected' co-conspirator but only of determining the extent of responsibility of a 'substantially connected' co-conspirator.* The court concludes that the jury's finding of industry-wide participation should be accepted." (1979-1 CCH Trade Cas. at 76,697-98; App. at C-3 to C-4 (emphasis added; footnotes and citations omitted).)

This ruling, which the Fifth Circuit affirmed *sub silentio*,[33] is unprecedented and anomalous. No other court has held that parallel conduct alone is sufficient, even under a slight evidence standard, to connect an absent party to a conspiracy.[34] Indeed, such a ruling is precluded by this Court's holding in *Cities Service*.

At page 20 of their brief in opposition to the petitions for certiorari, the respondents cited documentary exhibits mentioning a total of fifteen settled defendants, and contended that there was "direct, substantial evidence [that] linked the [absent] co-conspirators to the conspiracy." The fallacy inherent in this contention is that the district court held otherwise; it held that the *only* evidence connecting settled defendants to the

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[33] The insufficiency of the evidence to connect the settled defendants to the alleged conspiracies was raised by the petitioners at page 53 of their opening brief to the Fifth Circuit.

[34] *See, e.g., Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 513 F.Supp. 1100, 1169-70, 1265-98 (E.D.Pa. 1981) (proof of intercompany export agreements, membership in trade associations and parallel use of rebates do not constitute sufficient evidence of connection); *Vandervelde* v. *Put & Call Brokers' & Dealers' Ass'n*, 344 F.Supp. 118, 155-56 (S.D.N.Y. 1972) (mere membership and participation in a professional association does not constitute slight evidence); *United States* v. *Morgan*, 118 F.Supp. 621, 743-54 (S.D.N.Y. 1953) (facts that company took over some customers from its predecessor, followed some practices which may have been common in the industry, and interacted with competitors on underwriting syndication deals did not connect it to any conspiracy). Indeed, the italicized portion of the quoted language implies that where the issue is the "extent of responsibility" of the three trial defendants, something less than "slight evidence" will suffice.

conspiracies found among the trial defendants was evidence of parallel conduct. More specifically, it found that there was "particularized evidence" or "stipulations" that some settled defendants used West Coast freight or standard weights plus additional "general evidence" of the parallel use of these freight quotation practices by yet other settled defendants, and that these two elements of proof were legally sufficient evidence of connection.

A class action defendant should not be held liable for damages attributable to sales by its alleged absent party co-conspirators on the basis of such minimal evidence. The district court thus erred in finding that the record was sufficient to establish the connection of any settled defendant to the two alleged conspiracies. In the words of Judge Hunter of the Third Circuit:

> "Conspiracy is 'an elastic, sprawling and pervasive offense.' *Krulewitch* v. *United States,* 336 U.S. 440, 445 . . . (1949) (Jackson, J., concurring). Trial courts must take great pains to prevent the seine of a conspiracy charge from entangling a defendant only tangentially related to the agreement in question." (*United States* v. *United States Gypsum Co.,* 550 F.2d 115, 128-29 (3d Cir. 1977), *aff'd,* 438 U.S. 422 (1978).)

The district court simply failed to heed this good advice.

2. ***Policy Reasons Against Applying The Slight Evidence Rule.*** Even if the slight evidence rule was applied correctly in these cases, it should never have been applied at all. Since the district court issued its ruling in December of 1978, the Fifth Circuit has held in a criminal non-antitrust case that the rule offends due process of law, while the Third and Ninth Circuits have similarly either challenged the use, or revised the definition, of the rule.[35] As a consequence, at least one district court in a civil antitrust case refused to apply the rule, and required connection of an absent party to a conspiracy by the usual standard of the preponderance of the evidence. *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.,* 513 F.Supp. 1100, 1170 (E.D.Pa. 1981).

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[35] *See United States* v. *Malatesta,* 590 F.2d 1379, 1383 (5th Cir.), *cert. denied,* 440 U.S. 962 (1979); *United States* v. *Cooper,* 567 F.2d 252, 253 (3d Cir. 1977); *United States* v. *Dunn,* 564 F.2d 348, 357 (9th Cir. 1977).

That standard should have been applied in this case, given the rule against contribution among antitrust co-conspirators and the potential treble damage liability faced by the petitioners. Had it been applied, there would unquestionably have been no basis for linking the thirty settled defendants to either of the alleged conspiracies. Given this Court's recent ruling denying a right of contribution among co-defendants in antitrust cases, the degree of proof connecting settled co-defendants to the conspiracy found among the trial defendants in such cases should be the same as the degree needed to find collusion among the trial defendants in the first place. The slight evidence rule should have no place in class action antitrust cases; as the Third Circuit has warned in another context, "[t]he judiciary should not be hasty to allow the treble damage action to become so destructive a force, when Congress intended only that it be used as a weapon to enforce the antitrust laws." *Mid-West Paper Prods. Co.* v. *Continental Group, Inc.*, 596 F.2d 573, 587 (3d Cir. 1979).

CONCLUSION

The petitioner first requests this Court to vacate the judgments below and remand these cases to the district court with instructions to grant the petitioners' motion for a judgment *n.o.v.*

Alternatively, the petitioner requests the Court to vacate the judgments below and to remand these cases to the district court for a new trial.

DATED: August 16, 1982

Respectfully submitted,

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In The

Supreme Court of the United States

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WEYERHAEUSER COMPANY and WILLAMETTE INDUSTRIES, INC., *Petitioners,*

vs.

LYMAN LAMB COMPANY, et al., *Respondents.*

GEORGIA-PACIFIC CORPORATION, *Petitioner,*

vs.

LYMAN LAMB COMPANY, et al., *Respondents.*

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONERS WEYERHAEUSER COMPANY AND WILLAMETTE INDUSTRIES, INC.

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CHAR. P. YOUNG CHICAGO, INC.

QUESTIONS PRESENTED

1. Can an antitrust conspiracy properly be inferred from parallel business conduct and inter-company communications affording an opportunity for, but no proof of, collusion where the conduct is consistent with what would be expected in a competitive market?

2. Can absent firms be held antitrust co-conspirators with parties before the court, predicated only on their parallel business conduct?

3. Can the measure of damages in a case alleging the fixing of only one element of price be based solely on that element, or must the measure be the difference between the total price actually paid and the total price that would have been paid in the absence of the alleged conspiracy?

4. Were petitioners denied due process by the submission of the measure of damages to the jury when petitioners reasonably understood that the issue had been severed for later trial and the issue was submitted in the form of leading interrogatories that limited the jury's consideration to only one damage measure?

PARTIES TO THE PROCEEDINGS

Petitioners Weyerhaeuser Company and Willamette Industries, Inc., along with petitioner Georgia-Pacific Corporation, were appellants below.

Weyerhaeuser's subsidiaries and affiliates are: Camac Veneer, Inc.; Mountain Tree Farm Co.; North Pacific Paper Corp.; Shemin Nurseries, Inc.; Weyerhaeuser International, Inc.; de Bes' Insurance, Ltd.; Forest Insurance, Ltd.; Kennedy Bay Timber Sendirian Berhad; Silam Forest Products Sendirian Berhad; Pacific Hardwoods Sendirian Berhad; Weyerhaeuser Europe, S.A.; and Cornerstone Development Co.

Willamette's subsidiaries and affiliates are: Freres Veneer Co.; Santiam Southern Co.; Western Kraft East, Inc.; Wimer Logging Co.; and Taylor Development Co.

In addition to Lyman Lamb Company, appellees below were Plywood Distributing Company, Baton Rouge Lumber Company, and the City of Arkadelphia, Arkansas. The remaining plaintiffs in the cases consolidated for trial in *In re Plywood Antitrust Litigation*, Multidistrict Litigation No. 159, and the remaining members of the plaintiff class, consisting of all business and state governmental entities that purchased softwood plywood directly from manufacturers during the period from February 23, 1968 through December 31, 1973, also had an interest in the outcome of the appeal.

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Nos. 81-1618 and 81-1619

In The

Supreme Court of the United States

October Term, 1982

WEYERHAEUSER COMPANY and WILLAMETTE INDUSTRIES, INC., *Petitioners,*

vs.

LYMAN LAMB COMPANY, et al., *Respondents.*

GEORGIA-PACIFIC CORPORATION, *Petitioner,*

vs.

LYMAN LAMB COMPANY, et al., *Respondents.*

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONERS WEYERHAEUSER COMPANY AND WILLAMETTE INDUSTRIES, INC.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 655 F.2d 627, and appears as App. A in the Joint Appendix to Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Pet. J.A."). The opinion of the District Court denying a motion for judgment notwithstanding the verdict and for a new trial is reported at 1979-1 Trade Cas. ¶ 62,459, and appears as App. C in Pet. J.A.[1]

[1] The District Court opinion certifying the case as a class action is reported at 76 F.R.D. 570, and appears as App. D in Pet. J.A. The opinion of the Judicial Panel on Multidistrict Litigation consolidating the actions under 28 U.S.C. § 1407 is reported at 376 F. Supp. 1405, and appears as App. E in Pet. J.A.

JURISDICTION

The judgment of the Court of Appeals was entered on September 8, 1981. (Pet. J.A., App. F) Timely petitions for rehearing and rehearing *en banc* were denied on November 3, 1981. (Pet. J.A., App. G) Timely petitions for certiorari were filed on March 2, 1982, following an order by Justice White extending the time for filing to March 3, 1982. (Pet. J.A., App. H) On May 17, 1982, this Court granted the petitions and consolidated the cases. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in pertinent part:

> "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

A. Nature of Cases and Claims.

These private antitrust actions are part of complex multidistrict and Federal Trade Commission proceedings commonly known as "the Plywood cases." The private complaints, filed between 1972 and 1978, alleged that two of the plywood industry's long-standing methods of quoting prices, though noncollusive in origin, continued in use because of a conspiracy in restraint of trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. A parallel complaint by the FTC in 1974 contended that the continuation of the same pricing practices resulted from an unlawful combination and constituted an unfair method of competition in violation of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

Petitioners Weyerhaeuser Company, Willamette Industries, Inc., and Georgia-Pacific Corporation are manufacturers of softwood plywood. They were three of the respondents to the FTC proceedings and are the only remaining defendants in the private cases (the others having settled).[2] Respondents here are four members of the plaintiff class, which has been defined to include all businesses and state governmental entities that purchased softwood plywood directly from a manufacturer during the period from February 23, 1968 through December 31, 1973.

The pricing practices challenged in both the private and FTC proceedings involved the freight component of plywood prices. From the outset of the plywood industry it had been customary to quote prices on a delivered price basis, consisting of an individually negotiated mill price plus freight to the customer's location. The freight portion of the quotation was calculated on the basis of: (1) ICC rail tariffs from the Pacific Northwest ("West Coast freight"), and (2) standardized estimates of the plywood's weight ("standard

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[2]Georgia-Pacific is filing a separate brief. Weyerhaeuser and Willamette concur with and adopt the arguments in that brief.

weights") rather than its actual weight.

It was common ground in both the private and FTC cases that quoting freight on these two bases originated for sound business reasons and without collusion. When the practices grew up, all plywood was manufactured in the Pacific Northwest. Since the ICC freight tariffs to a particular location were essentially uniform for all producers, the use of a common West Coast freight factor was only natural. When plywood production spread to the South in the early 1960's, southern producers adopted the West Coast freight format because it helped customers compare southern plywood prices with the generally higher prices of western producers. For example, a St. Louis buyer with a quote from a Louisiana producer of $75 per 1,000 square feet plus West Coast freight could readily compare it with another quote of $77 plus West Coast freight from an Oregon producer. Moreover, if the buyer had multiple locations, he could readily compare the $75 quote with a quote to a Baltimore location of $76 plus West Coast freight, although the freight charges to St. Louis and to Baltimore were different. The format thus highlighted the seller with the lowest price.

The use of standard weights in quoting freight served a similar purpose in facilitating price comparison by purchasers. Because most plywood is sold before its final weight is known, the use of standardized estimates in calculating freight allowed producers to offer buyers a firm delivered price at the time of quotation. It also facilitated comparison among delivered price quotes since buyers did not have to be concerned about minor weight variances; whatever weight advantage a particular manufacturer might enjoy would be translated into a lower mill price. As a consequence of the two practices, the mill price became the focal point, or "index price," for nationwide price competition.

Although there was no claim that the two methods of freight quotation were conspiratorial in their origin or when

they initially spread to the South,[3] both the private plaintiffs and the FTC alleged that the practices subsequently lost their justification and were maintained only through collusion. The private plaintiffs contended that petitioners were participants in two separate conspiracies from at least February 23, 1968 (four years prior to the filing of the initial complaint) through December 31, 1973: *first*, a conspiracy among producers of southern plywood to use West Coast freight in the pricing of southern pine plywood; *second*, a conspiracy among plywood producers in both the South and the West to use standard weights in the pricing of western fir plywood. (See, *e.g.*, Brief for Appellees to Fifth Circuit, at 3)[4]

It is crucial that neither respondents nor the FTC claimed that the mill or "index" price was conspiratorially fixed. The evidence was conclusive that those prices and, in turn, the ultimate delivered prices were highly volatile, responding to intense competition among producers and overall forces of supply and demand.[5] Consequently, the issues in

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[3] When the FTC proceeding reached the Ninth Circuit, for example, the court specifically found that "the parties agree that the practice was a natural and competitive development in the emergence of the southern plywood industry. . . ." *Boise Cascade Corp.* v. *FTC*, 637 F.2d 573, 582 (9th Cir. 1980) (Pet. J.A., App. J-18). Similarly, respondents state that the conspiracy started in 1966 at the earliest, when they claim "southern plywood was 'readily accepted' in the southern market and could support its own price level independent of west coast prices." (Brief of Appellees to Fifth Circuit, at 6)

[4] Sixteen other southern producers were named along with petitioners as defendants in the first alleged conspiracy. These sixteen, some of whom also operated western mills, plus fourteen other western producers, were named along with petitioners as defendants in the second alleged conspiracy. These thirty other defendants settled prior to trial.

[5] This evidence is discussed at pp. 8-15, *infra*. In their response to the petitions for certiorari, respondents claimed that a conspiracy to fix "the whole price of the product" was involved. (Resp. Br. 5) To the contrary, respondents' counsel stressed in both his opening

the two proceedings were narrowed to: (1) was the continued use of the two practices the result of collusion and, if so, (2) did the use of the two methods of quoting the freight component have any adverse effect on the plywood prices paid by buyers?

The private and FTC proceedings resulted in sharply divergent answers to these questions. The FTC case, which went to trial first, led to a decision by the Ninth Circuit vindicating petitioners on both points. The court concluded that the challenged practices were not collusive and had no adverse effect on plywood prices, but instead promoted competition by facilitating customer price comparison. *Boise Cascade Corp.* v. *FTC*, 637 F.2d 573 (9th Cir. 1980) (Pet. J.A., App. J).

By contrast, the Fifth Circuit affirmed a jury verdict that petitioners were parties to the two conspiracies charged; that the difference between West Coast and actual freight costs was the measure of damages for the conspiracy relating to southern plywood; and that the difference between standard

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statement and closing argument at trial "that the case can really be quite simply stated" as a conspiracy "to fix *certain elements of price.*" (Tr. 3233-34; Tr. 78-80, 87-88; emphasis added) Likewise, the only issues put to or found by the jury were restricted to the existence of conspiracies to use West Coast freight and standard weights when quoting delivered prices. (Special Verdict, Pet. J.A., I-1, I-2)

The following abbreviations are used throughout this brief: "J.A." (Joint Appendix filed in this Court by petitioners and respondents); "Pet. J.A." (Joint Appenidx filed with petitions for certiorari); "Vol." (volume of the Record on Appeal); "Supp. Vol." (volume of the First Supplemental Record on Appeal); "2d Supp. Vol." (volume of Second Supplemental Record on Appeal); "PX" or "DX" (plaintiffs' or defendants' trial exhibits, with transcript references to pages where exhibit was offered and admitted into evidence in parentheses); "Tr." (trial transcript); and "Dep." (deposition transcript). The trial transcript is contained in volumes 45-56 of the record on appeal.

and actual weight costs was the measure of damages for the western plywood conspiracy. (655 F.2d at 634-36, Pet. J.A., A-8 to A-12) Although the matter is sharply disputed, respondents have estimated that this decision could set the pattern for class-wide damages of as much as two billion dollars. (Wall St. J., Sept. 9, 1981, at 48, Col. 4)

The petitions for certiorari urged that the Fifth Circuit's decision not only ignored the Ninth Circuit's reasoning and result, but also represented an unsupportable departure from the antitrust conspiracy and damage rulings of this Court and other circuits. In sum, petitioners contended: (1) there was no justification for inferring conspiracy from petitioners' parallel use of the challenged pricing practices, plus some inter-firm communications affording only an opportunity for collusion, when the practices were fully consistent with normal competitive behavior; (2) there was equally no basis for the court to affirm conspiracy findings embracing other plywood producers as to whom the only evidence was their parallel use of the challenged practices; (3) it was error to adopt a measure of damages which looked solely to the freight component of plywood prices, rather than the pricing format's effect, if any, on the total price actually paid by buyers for their plywood; and (4) the trial court denied petitioners due process by submitting the measure of damages to the liability jury in derogation of earlier bifurcation rulings and in the form of leading interrogatories that left the jury no realistic alternative but to accept the freight and weight differentials as the damage measures.

The resolution of these important issues requires a fuller exposition of the nature and operation of the challenged pricing practices, their differing treatment by the courts of appeals, and the course of the proceedings below.

B. The Practice of Quoting "West Coast Freight."

As noted, the practice of quoting plywood prices on the basis of an individually negotiated mill or index price, plus rail freight from the West Coast, arose when all softwood

plywood was manufactured in the Pacific Northwest. Production was concentrated in that region because, prior to technological advances in the early 1960's, softwood plywood could be made only from western fir. (Tr. 474-75) Because all plywood was shipped from the West Coast, producers quoted their delivered prices on the basis of "West Coast freight."

In 1964, Georgia-Pacific opened the first southern plywood mill following a manufacturing breakthrough that made it possible to produce plywood from southern pine. Other producers, including Weyerhaeuser and Willamette, soon followed. By the time of the jury trial in 1978, there were 16 producers operating only in the South, 100 operating only in the West, and 8 (including petitioners) operating in both.

When Georgia-Pacific opened the first southern mill, it adopted the existing pricing format of an individually negotiated mill or index price, plus West Coast freight. Other producers also used this format when their mills came on stream. There was nothing secret or conspiratorial in their action. Buyers were fully aware that southern plywood was being quoted on the basis of West Coast freight, since the purpose of using this format was to communicate southern prices in a way that allowed customers to compare them with western prices. Buyers were also aware that the quoted freight was generally higher than actual freight from the southern mill. This was common knowledge, and the actual freight charges generally appeared on the face of the invoice or were used to calculate the buyer's cash discount. (Tr. 2750-51; PX 34 (Tr. 277-78); PX 36 (Tr. 989-90); PX 37 (Tr. 999))

In both the private and FTC cases, industry participants confirmed that the use of the West Coast freight format stimulated competition by facilitating price comparison. Since there was initial skepticism about the quality of southern plywood, southern producers generally charged lower delivered prices than western producers. (Tr. 2004; Tr. 2892, J.A. p. 358) Use of the western pricing format was the clearest way of communicating this fact. Since buyers knew that "West Coast freight" to any particular destination was

uniform, they could compare delivered prices and select the lowest one by looking directly to the mill or index prices of competing sellers. (Tr. 161; Tr. 1459-60; Tr. 2134-35, J.A. pp. 303-04; Tr. 2275, J.A. p. 309; Tr. 2747-48) As the Ninth Circuit found and the record below confirmed:

> "The use of West Coast freight enabled buyers to compare western and southern plywood prices by reference to a single mill or index price, knowing that the precise difference would be reflected in a total delivered price. Without West Coast freight, comparison would also have been more cumbersome because southern freight rates are point-to-point rather than zone rates and vary according to the weight of the load." (637 F.2d at 574 n.1; Pet. J.A., J-2. See Tr. 299-300; Tr. 1035-36, J.A. pp. 271-72; Tr. 1374-76; Tr. 2004-05)

The testimony at trial further confirmed that the use of the West Coast freight format had no adverse effect on the plywood prices buyers paid. There was intense competition in mill prices. (Tr. 894-95; Tr. 1048-50, J.A. pp. 274-75; Tr. 1347-48; Tr. 1534, 1536) This competition translated directly into equally intense competition over delivered prices, with the lowest mill or index price resulting in the lowest delivered price.

The evidence was uncontradicted that mill prices were highly volatile, changing weekly and even daily in response to shifting conditions of supply and demand. Different sellers quoted different prices to different buyers in individual negotiations, and buyers routinely shopped among sellers for the lowest price. (Tr. 894-95; Tr. 1046; Tr. 1048-50, J.A. pp. 274-75; Tr. 1076-79, J.A. pp. 288-90; Tr. 1347-48; Tr. 2738-40; Tr. 2753; Tr. 2803-04; Tr. 2813-15) Independent reporting services published the going mill prices, at first on a weekly basis and eventually on a semi-weekly basis because of the frequency of price changes.

In the early years of the southern plywood industry, delivered prices from southern mills were close to the

delivered prices of western mills, despite the lower freight costs of southern mills to southern customers. Both respondents' and petitioners' economists agreed that this was consistent with what economic theory postulates in a competitive market. (Tr. 2404-05, J.A. pp. 326-27; Tr. 2891-92, J.A. pp. 358-59) As long as southern producers were unable to satisfy all the demand in their market—or, stated more technically, as long as western plywood remained the marginal supply—buyers bid plywood prices up to the western level in order to attract sufficient western plywood to the area to meet the unfilled market demand.

According to respondents, however, any justification for the use of the West Coast format gradually disappeared as the southern plywood industry grew. As previously remarked, respondents claimed that from at least February 23, 1968 through December 31, 1973, the practice continued because of an alleged conspiracy among the producers of southern plywood. Respondents pointed to no clandestine meetings or telephone calls during which the "conspiracy" was purportedly conceived or subsequently policed. The use of West Coast freight after 1968 remained as open and aboveboard as it had been during the preceding decades. (Tr. 2750-51)

Instead, plaintiffs relied on evidence that petitioners occasionally communicated among themselves and with some—but far from all—of the other southern producers on a variety of business matters ranging from plywood supplies, to publicly reported prices, to technical manufacturing matters.[6] These communications occurred during negotiations over inter-company sales, plant visits, trade association meetings, and the like. Although these communications were urged as "direct evidence" of a conspiracy to use West Coast

[6] *E.g.*, PX 10, J.A. p. 385 (Tr. 773, 774); PX 29, J.A. p. 388 (Tr. 2193); PX 174, J.A. p. 398 (Tr. 346, 347); PX 175, J.A. p. 399 (Tr. 348); PX 180, J.A. p. 401 (Tr. 364, 2660-62); PX 182, J.A. p. 405 (Tr. 372, 2660-62); PX 183 (Tr. 434-35, 2660-62); PX 189 (offered Tr. 1495, admitted October 26, 1978 but not shown in transcript); PX 192 (Tr. 1495, 1500); PX 749 (Tr. 2049, 2050).

freight, respondents produced no evidence that in any way reflected actual agreement. All that respondents' evidence showed was that the contacts gave petitioners the opportunity to conspire regarding the continued use of West Coast freight.[7]

Similar inter-company communications had gone on for many years without leading to supposed collusion over West Coast freight. In an attempt to explain why a practice that was open and noncollusive for so long could have suddenly become conspiratorial, respondents turned to the testimony of an economist. Respondents' expert acknowledged that the use of West Coast freight was warranted at the inception of the southern plywood industry, but asserted that it became artificial in later years. (Tr. 2467-68, J.A. p. 351) He posited that, as the southern plywood industry developed, the freight savings enjoyed by the southern mills should have been passed on to buyers; there should have been "a process of price reduction which would gradually reduce the price down to a level of normal returns." (*Id.*) The same contention was made by the FTC. (91 F.T.C. at 89-90)

Neither respondents' expert nor the FTC specified any date when the process of price reduction should have commenced. On the contrary, respondents' expert acknowledged that southern prices would remain at the level of western prices for an "unknown period of time." (Tr. 2405, J.A. p. 327) He was also unable to say when the downward pressure, once it began, would result in a pass-on of all freight savings to customers. "How long it will take depends on a number of conditions." (Tr. 2467, J.A. p. 350)

Most important, respondents' expert made no investigation into fluctuations in delivered prices to determine whether the differential between West Coast and actual freight had been offset, in whole or in part, by competition over mill prices.

[7]The FTC frankly acknowledged that there was no proof that petitioners "met and formally conspired to add West Coast freight, or to adopt 'association' weights . . . ." (91 F.T.C. at 51)

To the contrary, he testified that the fluctuations in the delivered prices actually paid by buyers "did not make any difference" to his analysis. (Tr. 2390-92) It is self-evident, however, that if southern producers lowered their mill prices below western mill prices, this would have the effect of passing on some or all of the differential between West Coast and actual freight. Assume, for example, that West Coast freight is $15 and actual freight is $10, so that the southern producer's freight saving to a southern customer is $5. Assume further that the southern producer initially quoted a mill price of $85, plus West Coast freight of $15, for a delivered price of $100. If he subsequently lowers his mill price to $80, plus West Coast freight of $15, this has the same effect of passing on the $5 freight saving as if he kept his mill price at $85 and reduced his freight quote to $10. In both cases there is an identical reduction in the delivered price from $100 to $95.

Such a decline in delivered prices is exactly what happened to plywood prices in the South, notwithstanding the use of West Coast freight in quoting prices. As the southern industry grew and its output increased, southern producers used their lower freight costs to reduce mill and thus delivered prices in order to compete for nearby customers. Western plywood was driven out of more and more southern markets by this price competition. (Tr. 608; Tr. 1380-81) Southern prices continued to fall relative to western prices as the construction of additional southern mills led to an erosion of the freight advantage enjoyed by the initial southern mills (Tr. 2004; Tr. 2733-34)—precisely as respondents' expert had predicted in a competitive market.[8]

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[8] Of course, southern prices could not be expected to fall by the exact amount of the freight cost saving, since southern mills tended to have higher production costs than western mills, which offset in part their freight advantage. (*E.g.*, PX 12 (Tr. 2689); PX 13 (Tr. 2689); PX 14 (Tr. 2689); PX 64 (Tr. 1650-51); PX 65 (Tr. 1650-51); PX 66 (Tr. 1650-51); PX 67 (Tr. 1650-51)) Respondents' expert undertook no examination of these different production costs. (See p. 59, *infra*)

By early 1967 southern prices had dropped sufficiently below western prices, and in a large enough area, that the industry's independent reporting services began to publish separate index prices for southern plywood in addition to the traditional index prices for western plywood. For ½ inch standard exterior plywood, southern mill prices (and hence delivered prices) in 1967 averaged $2.50 less than western prices ($73.70 versus $76.20). During the period of the alleged conspiracy from 1968 through 1973, the amount by which southern prices undercut western prices widened—from $3.80 in 1968 to $12.30 in 1973. For ¾ inch standard exterior plywood, the gap between western and southern prices was even more pronounced—increasing from an average of $5.70 in 1968 to $22.20 in 1973. (Vol. 33, pp. 23393-473, Exs. A-2, A-3.[9] See Tr. 2753; PX 701 (Tr. 2689); PX 703 (Tr. 2689); PX 795 (Tr. 2689); PX 796 (Tr. 2689) PX 914 (Tr. 1729)) Especially given the generally higher production costs at southern mills, these lower mill prices showed that the geographic freight advantage was in fact being bargained away.[10]

[9] This citation is to factual exhibits accompanying a post-trial affidavit of Dr. Peter Steiner. The material was not presented to the jury because, as discussed in Part III below, petitioners believed measure of damages had been severed. Such evidence was discussed in petitioners' brief to the Fifth Circuit (*e.g.*, pp. 84-86) without objection from respondents.

[10] The evidence that the southern freight advantage had been progressively passed on to buyers undermined not only respondents' conspiracy claim, but their asserted measure of damages as well. There is no basis for a verdict that respondents were injured by the difference between West Coast freight and actual freight when the undisputed evidence showed that respondents had already received the differential in the form of lowered mill prices. By way of example, respondents Lyman Lamb Company and Baton Rouge Lumber Company put in claims for $23.30 per thousand feet of ½ inch southern plywood purchased in February 1973, when the industry's reporting services showed southern plywood was $30 cheaper than western

In sum, although the format in which southern and western prices were quoted remained the same, the resulting prices did not. Moreover, the West Coast format continued to serve its legitimate purpose of facilitating price comparison by buyers even after lower southern plywood prices ousted western plywood from southern markets. As late as 1974, there were broad geographical areas of sales overlaps by southern and western producers in the central and eastern portion of the United States stretching from Nebraska to the East Coast and from Kentucky to the Canadian border. (DX 258, J.A. p. 467 (Tr. 2950); DX 259 (Tr. 2949); Tr. 2949-54) In these areas, buyers continued to prefer the West Coast format because it permitted easy price comparison. (Tr. 299-300; Tr. 2747)

Additionally, although southern producers gradually displaced western producers in sales of *sheathing* plywood in the south, western producers at all times remained dominant in *sanded* plywood. (Tr. 3022-24, 3029)[11] The continued use of the West Coast pricing format in quoting sanded plywood provided still another stimulus for its use in quoting sheathing plywood as well.

Finally, not only was the general level of southern prices below the level of western prices, but southern prices themselves differed from seller to seller and from transaction to

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plywood in that month. Similarly, respondent Plywoods Distributing Co. claimed damages of $22.67 per thousand feet of ¾ inch southern plywood purchased in May 1972, when southern plywood was already selling at $23 less than its western counterpart in the same month. (See evidence cited in text)

[11] During the 1960's and early 1970's, sheathing plywood was used principally in basic construction applications such as floors, walls and roofs. Sanded plywood was used in the molds used when pouring concrete and in more visible applications such as cabinets. Western sanded plywood was preferred during this period because southern sanded plywood tended to warp and was not as visibly appealing. Unless otherwise indicated, references in this brief to "plywood" are to sheathing plywood.

transaction, as would be expected in a competitive market. Just as before the alleged conspiracy, prices continued to be highly volatile, fluctuating constantly in response to changing market conditions. (Tr. 894-95; Tr. 1048-50, J.A. pp. 274-76; Tr. 1347-48; Tr. 2753; Tr. 2803-04; Tr. 2814-15) In 1973, for example, when the alleged conspiracy was purportedly still in force, southern prices for ½ inch plywood varied from $93 to $155. (Vol. 33, pp. 23393-473, Ex. A-2)[12] This price volatility led the Ninth Circuit to conclude:

> "[T]he price for plywood sheathing rises or falls in response to market factors affecting supply and demand: housing starts, weather conditions, box car shortages and strikes. We have found no evidence in the record suggesting that the price of plywood has been unresponsive to market conditions." (637 F.2d at 577; Pet. J.A., J-9. See Tr. 1080, J.A. p. 291; Tr. 1260; Tr. 1536; Tr. 2227)

C. The Use of "Standard Weights" in Quoting Freight.

Like the use of West Coast rail tariffs, the practice of quoting freight on the basis of a standardized estimate of the plywood's manufactured weight, rather than its actual weight, dated back to the early years of the plywood industry. The reason for the continuation of practice was grounded in the same legitimate desire of buyers and sellers to facilitate price quotation and comparison.

As previously noted, most plywood is sold before its ultimate weight is known. (Tr. 3089-90) Actual manufactured weights vary considerably, depending on factors such as the geographic source of the trees, the moisture in the trees at the time of year they are harvested, and the equipment used at the particular mill. Some form of estimated weights was required for sellers to offer a firm delivered price at the time of quotation. The use of standard estimates allowed buyers to shop among competing producers, knowing that any differences in freight due to expected weight variations had been

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[12] See note 9, *supra*.

translated into differing mill prices. (Tr. 247; Tr. 1365; Tr. 2058-59; Tr. 3092-93; Tr. 3095)

The standard weights used in the industry were well known to buyers and sellers alike. They were originally promulgated by the federal government in the 1930's and were reinstituted by the Office of War Information during World War II and the Office of Price Stabilization during the Korean conflict. (Tr. 174-75) Thereafter, buyers and sellers continued to use the same standard weights, partly from habit, but primarily because the practice preserved the convenience of negotiating only one, easily comparable number —the mill price. (Tr. 247; Tr. 251)

The standard weights were originally accurate reflections of the average weights of shipments of the various plywood thicknesses. Over time, as drying equipment and techniques improved, the average weight of plywood shipped by western mills declined. The result was that "underweights"—actual weights below standard weights—became common in the West, though not in the South where actual weights remained in line with or above standard weights due to the different qualities of southern pine. (PX 347, J.A. p. 421 (Tr. 1909); Tr. 566-68, J.A. pp. 245-46) The existence of "underweights" on western plywood was general knowledge in the industry, with the actual weight shown on the freight bill. (PX 34 (Tr. 277-78); PX 36 (Tr. 989-90); PX 37, J.A. p. 393 (Tr. 999))

Nevertheless, the existence of "underweights" led both the private plaintiffs and the FTC to suspicions of collusion. Their theory was similar to that regarding West Coast freight—producers were allegedly overcharging buyers by quoting a higher figure for freight than the actual freight charge. Although respondents claimed the same conspiracy period, February 23, 1968 through December 31, 1973, both the product and the participants in the asserted "standard weight" conspiracy were different: the conspiracy was claimed to relate solely to western plywood and was said to encompass producers from both the South and West.

As with the asserted West Coast freight conspiracy, respondents produced no evidence of clandestine meetings or surreptitious phone calls at which an agreement to use standard weights was conceived or later enforced. Respondents again relied on evidence of inter-company communications that proved only an opportunity for collusion, and urged that this supported an inference of agreement to continue a practice that had been carried on openly for over forty years. (*E.g.*, PX 347, J.A. p. 347 (Tr. 1909)) Because the alleged agreement reached nationwide, forming and sustaining such a massive conspiracy would suggest the need for frequent inter-firm contacts. Yet respondents offered no evidence that standard weights were even mentioned in communications between more than a handful of producers. On the rare occasions when standard weights were mentioned in passing, the evidence showed no invitation to agree on their continued use, let alone any acceptance of such an invitation.

Respondents' conspiracy hypothesis was also undermined by the testimony that standard weights served the same legitimate purpose of facilitating price comparison during 1968-73 as they always had. Moreover, since mill prices remained competitive at all times, freight savings attributable to "underweights" continued to be bargained away in the form of lower mill prices, which translated into lower delivered prices. (Tr. 631-32; Tr. 1701; Tr. 2020-22) Consequently, as one class member testified, it was "no concern of mine" whether the actual weight was more or less than the estimated weight. All he was "shopping for" was the lowest overall delivered price. (Tr. 2751-52)

D. The FTC Proceeding and the Ninth Circuit Decision.

Trial of the FTC's case commenced in 1975 and resulted in an Initial Decision by the Administrative Law Judge in November 1976. *Boise Cascade Corp.*, 91 F.T.C. 1, 6 *et seq.* (1978) Despite the "opportunities" to conspire which the ALJ found in the producers' trade association memberships and the "direct evidence of the exchange of information"

among them, the ALJ found no basis for concluding that the producers' use of West Coast freight or standard weights was the result of "overt collusion." (*Id.* at 51, 100) Taking an expansive approach to this Court's Sherman Act precedents, however, the ALJ concluded that a conspiracy could be "inferred from their pursuit of a common course of conduct involving the inclusion of a uniform freight charge based on West Coast freight for plywood shipments from southern mills." (*Id.* at 100; *see also* 76-78) He similarly inferred a conspiracy to use standard weights and issued an order enjoining both practices. (*Id.* at 85)

In an Opinion and Final Order issued in January 1978, the full Commission adopted the ALJ's finding that there was no overt collusion, observing that petitioners were "obviously not" in "a price-fixing cartel." (*Id.* at 99 n.10, 102, 105) Unlike the ALJ, however, the Commission declined to hold that a Sherman Act conspiracy could be inferred from the continuation of parallel pricing practices that it acknowledged were "innocent" in origin and continued largely due to "force of habit." To draw such an inference, the Commission concluded, "would constitute something of an extension of the common understanding" of the term "conspiracy." (*Id.* at 102 & n.15) Instead, the Commission reasoned that it was unnecessary to find conspiracy since it held that petitioners could be ordered to cease and desist from the challenged practices on the ground that "the concurrent although non-collusive adoption by competitors of an artificial method of pricing which restrains competition" is unlawful under § 5 of the FTC Act. (*Id.* at 103)

In May 1980, the Ninth Circuit set aside the Commission's order. *Boise Cascade Corp.* v. *FTC*, 637 F.2d 573 (9th Cir. 1980) (Pet. J.A., App. J). The Court (per Wallace, J.) held that, whether approached under § 5 of the FTC Act or § 1 of the Sherman Act, "parallel behavior, without more does not trigger the *per se* treatment which is given to overt agreement." (*Id.* at 581, Pet. J.A., J-17) Rather, "the weight of the case law" makes clear that "we are looking for at least

tacit agreement to use a formula which has the effect of fixing prices." (*Id.* at 576, Pet. J.A., J-7 to -8) As Judge Wallace explained:

> "The debate over conscious parallelism comes down to whether it is ever appropriate for evidence of the anticompetitive effect of certain types of parallel conduct to serve as a substitute for the Sherman Act requirement of agreement. Without reaching that broader issue, we believe that to apply *per se* analysis to these facts would be to assume what must be proven, namely, that the use of West Coast freight by southern plywood producers is not a natural competitive response to buyer preference for traditional forms of price quotation, but rather is a deliberate restraint on competition. Without proof that the practice exerts an anticompetitive effect on the price of plywood, we have no reason to make such an assumption. *Cf.* Turner, *Agreement under the Sherman Act, supra*, 75 Harv. L. Rev. at 658-59 (conscious parallelism is evidence of agreement only if additional facts indicate that the decisions are inexplicable as ordinary competitive decisions)." (*Id.* at 581, Pet. J.A., J-17)

Based on a careful analysis of competitive conditions in the plywood industry, the Ninth Circuit found "a complete absence of meaningful evidence in the record that price levels in the southern plywood industry reflect an anticompetitive effect" from the use of West Coast freight or standardized weights. (*Id.* at 579, Pet. J.A., J-12) It also found "a complete absence of evidence implying overt conspiracy" to quote on those bases. (*Id.* at 582, Pet. J.A., J-18)

Judge Wallace observed that the challenged method of quoting plywood prices was "a natural and competitive development in the emergence of the southern plywood industry," since the "use of West Coast freight made possible ready comparison between western and southern plywood prices" and "encouraged expansion of southern mills." (*Id.* at 574, 582, Pet. J.A., J-2 to -3, J-18) Even after the southern

producers had established themselves, they "continue[d] to compete with western plywood in many areas of the country," and buyers in those areas were "particularly likely to prefer the ready price comparison between western and southern plywood made possible by the use of the West Coast index price." (*Id.* at 578, Pet. J.A., J-11)

The Ninth Circuit found a "complete lack of buyer testimony objecting to the practice," with purchasers instead expressing the "belief that the system had no effect on prices." (*Id.* at 580, Pet. J.A., J-14) The buyer testimony was confirmed by evidence that mill or index prices were the subject of substantial bargaining and varied "in response to market factors affecting supply and demand." (*Id.* at 577, Pet. J.A., J-9) Because of this price competition, Judge Wallace concluded there could be no adverse effect on the delivered price, since there was nothing to counter "the common-sense proposition that southern producers would simply adjust the index price upwards if they were quoting delivered prices in terms of actual freight," rather than West Coast freight. (*Id.* at 580, Pet. J.A., J-14)

In sum, the Ninth Circuit concluded that petitioners' method of quoting freight involved the *form* in which delivered prices were expressed without affecting the *delivered prices themselves.*

E. The Jury Trial and the Fifth Circuit Decision.

Trial of the private actions commenced in October 1978. It was essentially a paper case, with the only live testimony coming from the parties' respective experts. Although there were some differences from the FTC record, the key evidence was the same. Respondents opened their case, over petitioners' objection, with a 31-page reading to the jury from selected findings from the FTC decision that was then on appeal and was later set aside by the Ninth Circuit. They again stressed the parallel to the FTC case in closing argument, suggesting, contrary to fact, that the FTC had found against defendants on the issue of conspiracy. (Tr. 150,

152-83; Tr. 3244)[13]

Respondents' other conspiracy evidence, consisting largely of documents and deposition extracts, relied heavily on the same type of inter-company contacts that had been presented and rejected in the FTC proceeding. Respondents called no plaintiff or other buyer witness to testify that petitioners' method of quoting prices had caused any adverse effect on delivered prices. Respondents' only witness on the asserted impact of the challenged practices was the economist whose testimony has been described previously (pp. 10-12).

Petitioners introduced deposition testimony from plywood buyers and sellers who traced the business reasons which had led to the initial use of West Coast freight and standard weights and which explained their continued and legitimate use during the period of the alleged conspiracy. As in the FTC proceeding, these witnesses stated that buyers preferred to receive quotes in this form for ease of comparison. (Tr. 299-300; Tr. 2005; Tr. 2747) The witnesses explained why the two methods of quoting freight facilitated, rather than impaired, price competition and why they had no adverse impact on plywood prices. Typical was the testimony from one of the nation's largest plywood buyers. Although a class member who stood to benefit if respondents succeeded, he stated unreservedly that the challenged practices had no effect on plywood prices. In his view, "No matter which way you jumble it up, I'm still looking for that delivered cost." Consequently, the "form in which the price is quoted" does not "in any way affect what that delivered price is going to be." (Tr. 2749) He also confirmed that he preferred to receive quotes in the customary format because they were

[13]The trial court overruled petitioners' objections (1) that respondents' use of the selected FTC findings misled the jury into believing petitioners had been found guilty of conspiracy in a government case, (2) that the jury was not told about the FTC's conclusion that no collusion existed, and (3) that there was an appeal pending which could (and eventually did) lead to a reversal of those portions of the FTC decision unfavorable to petitioners.

"much easier for me" to work with when comparing prices. (Tr. 2747)[14]

Petitioners also called Dr. Peter O. Steiner, Professor of Law and Economics at the University of Michigan. He testified that petitioners' use of West Coast freight when quoting prices was "fully consistent with a competitive market," since this format "made it easy to directly compare the price to the buyer" of western and southern plywood. (Tr. 2894-95, J.A. p. 360) He also explained that the use of estimated weights was "certainly consistent" with a competitive market, since it satisfied the desire of buyers "to have a delivered price, a price to them that is an agreed firm price." (Tr. 2897-99, J.A. pp. 362-63) Most important, he explained that, given the intense competition over mill prices, "[t]he form of the price quotation does not effect the price that is negotiated, that is agreed upon between the buyer and the seller." (Tr. 2901, J.A. p.364) This testimony paralleled his earlier testimony in the FTC proceeding, where it was expressly relied on by the Ninth Circuit. (637 F.2d at 580, Pet. J.A., J-14)

Petitioners offered no evidence on measure of damages because, early in the proceedings, the district court had "split the liability and damage phases of these proceedings." (Supp. Vol. 16, 14162-95) This initial bifurcation was reconfirmed in petitioners' view by the court's pretrial order of March 27, 1978, formally severing "for subsequent trial as appropriate . . . amount of damages sustained by individual plaintiffs, intervenors and class members." (J.A. p. 127) The trial judge also told prospective jurors that, whereas they would be determining "whether or not these three defendant companies did violate the antitrust law in the way the plaintiffs claim, and if so, whether that caused impact or damage" to purchasers, they "will not be determining the amount, the dollar amount of any such overcharge." (Tr. 5-6, J.A. p. 131)

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[14]The same point has been convincingly made in the *amicus curiae* brief filed by Bowie-Sims-Prange and three other plywood customers in support of the petitions for certiorari.

Notwithstanding these indications that measure of damages had been severed, the trial judge on his own initiative submitted interrogatories to the jury at the close of the liability trial on the appropriate measure of damages. These interrogatories, which were unexplained by any instructions on the proper method of computing antitrust damages, placed before the jury only one measure for each of the alleged conspiracies: (a) the difference between West Coast and actual freight for southern plywood, and (b) the difference between freight calculated on the basis of standard and actual weights for western plywood. (Pet. J.A., I-2, I-3)

On November 14, 1978, the jury returned a verdict that "the use of 'West Coast freight' in the pricing of Southern pine plywood during the period from February 23, 1968 to December 31, 1973, [was] the result of a conspiracy" between petitioners and the other southern producers. The jury also found that "the use of 'standard weights' in the pricing of Western fir plywood" resulted from a conspiracy during the same period between petitioners and both southern and western plywood producers. (Pet. J.A., I-1 to I-3) The jury adopted the only measure of damages before it, the one suggested in the trial court's interrogatories. (*Id.*) In supplemental proceedings, the court applied this measure to the four respondents as sample plaintiffs, and granted them summary judgment in the amount of $1,101,913.17. Separate judgments for each respondent were entered on February 21, 1980. (Pet. J.A., App. B)[15]

On September 8, 1981, the Fifth Circuit affirmed the jury verdict and judgments in all respects. On the conspiracy issue, the Court (per Ingraham, J.) held that "the parallel pricing conduct clearly demonstrated in the record plus the numerous items of direct evidence of communication between high-level personnel on pricing policy adequately support the jury's verdict." (655 F.2d at 634, Pet. J.A., A-9) The

[15] The calculation of individual damages for class members other than respondents is the subject of current proceedings in the trial court.

Court cited six of petitioners' internal memoranda as examples of such communications. (*Id.* at 633-34, Pet. J.A., A-6 to A-8) None made any reference to the practice of using standard weights. The only one making even a passing reference to West Coast freight was a Weyerhaeuser competitive intelligence report on prices Georgia-Pacific had already adopted in the marketplace. (See pp. 38-40, *infra.*)

This was the same type of evidence that the ALJ, the FTC and the Ninth Circuit had found insufficient to establish collusion.[16] The Fifth Circuit made no effort to reconcile this conflict or to deal with the extensive analysis by the Ninth Circuit showing that the continued use of the pricing practices was consistent with a competitive market. Instead, Judge Ingraham dismissed the Ninth Circuit opinion in a footnote on the ground that the Fifth Circuit was not "bound" by the earlier decision. (655 F.2d at 636-37 n.2, Pet. J.A. A-13)[17] Judge Ingraham did not discuss the issue of how the other southern producers, let alone the other U.S. producers, could be found to be co-conspirators, when the trial judge had acknowledged that the only proof as to most

[16] The ALJ specifically referred to several of the same memoranda cited by the Fifth Circuit. (*Compare* 91 F.T.C. at 51-52 *with* 655 F.2d at 633-34, Pet. J.A., A-6 to -8)

[17] The Fifth Circuit misconceived the import of the Ninth Circuit opinion in several respects. The Fifth Circuit concluded that the earlier decision was not collateral estoppel, although petitioners expressly disclaimed the need to reach that issue. (Reply Brief to Fifth Circuit, at 6 n.3) Petitioners' point was that the Ninth Circuit opinion should be followed because of its persuasive legal and economic analysis. The Fifth Circuit also erred in believing that the Ninth Circuit had never reached the conspiracy issue and that the separate statutory bases for the two proceedings made them distinguishable. Actually, the Ninth Circuit ruled that the same showing was required to establish collusion under § 5 and § 1 (pp. 18-19, *supra*). Even had the Ninth Circuit concluded that less was required under § 5, its finding that there was no collusion would apply *a fortiori* to a case, such as this, under the stricter standards of § 1.

was evidence of a "general nature, to the effect that the challenged practices were industry-wide in scope and were employed by all manufacturers." (Pet. J.A., C-3)

On the damage issue, the Fifth Circuit approved the measure of damages fixed by the jury, stating that, "given proof of the fact of damage, proof of losses which border on the speculative is allowed in order to facilitate the policy of the anti-trust laws." (655 F.2d at 635, Pet. J.A., A-10; citation omitted) The Court relied on the testimony of respondents' expert to the effect that, "if competition had been at work in the plywood industry during the damage period, it would have eliminated the ability of defendant plywood manufacturers to realize additional revenue in the amount of the phantom freight charged on the sale of southern plywood." (*Id.* at 630, Pet. J.A., A-11) Judge Ingraham took no account of the fact that neither the witness nor the jury had been asked to determine the difference between the delivered prices actually paid and what they would have been absent the alleged conspiracy. As with the conspiracy issue, the Fifth Circuit made no attempt to reconcile the potentially staggering damages resulting from the measure of damages with the Ninth Circuit's conclusion that petitioners' use of West Coast freight had no effect whatever "on overall price levels." (637 F.2d at 581, Pet. J.A., J-16)

Finally, the Fifth Circuit found no error in the trial judge's submission of the measure of damages to the jury in the face of the earlier bifurcation order. Judge Ingraham stated that petitioners should have understood the order as severing the calculation of individual damages but not the measure of damages applicable to those calculations. (655 F.2d at 635-36, Pet. J.A., A-11) He made no mention of the district court's post-trial concession that petitioners' contrary understanding was reasonable. The trial judge explained that, while he thought he was drawing a distinction between the terms "amount of damages sustained by individual plaintiffs" and "measure of damages," it "may very well be and the Court has no reason to doubt [the] sincerity of defense

counsel in perhaps equating those two terms." (J.A. p. 237)

SUMMARY OF ARGUMENT

The jury verdict and affirmance by the Fifth Circuit departed from sound principles of antitrust conspiracy and damage law and denied petitioners due process in three broad respects: *First*, the jury was permitted under the conspiracy standard applied by the courts below to find two industry-wide agreements based on evidence that was demonstrably insufficient to support a rational inference of collusion. *Second*, the jury was given no instruction on the proper measure of damages and was led by the trial court's interrogatories to a verdict that took no account of whether, or to what extent, the asserted conspiracies had any effect on actual plywood prices. *Third*, the submission of the measure of damages to the jury in contravention of earlier bifurcation rulings and in the form of leading interrogatories violated petitioners' constitutional right to notice and a fair opportunity to be heard on that issue.

I.

Parallel business practices are to be expected in competitive markets because like businesses respond similarly to the same economic forces. Consequently, since *Theatre Enterprises* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954), it has been settled that parallel business conduct, even when taken with conscious awareness of a competitor's actions, is insufficient to prove a Sherman Act conspiracy.

The handling of the conspiracy issue by the trial court and the Fifth Circuit marks a dramatic departure from this rule. The trial court ignored *Theatre Enterprises* when it upheld the verdict of two industry-wide conspiracies despite the court's frank recognition that the only evidence concerning most plywood producers was their parallel use of the long-standing practices of quoting plywood prices on the basis of West Coast freight and standard weights. The Fifth Circuit

affirmed this ruling without discussion.

The insensitivity to the teachings of *Theatre Enterprises* carried over to the remaining producers. Even where the parallel use of the challenged practices was accompanied by "direct evidence of communication" among some producers (655 F.2d at 634, Pet. J.A., A-9), the trial court's charge and the Fifth Circuit's opinion erroneously permitted the jury to find conspiracy based on communications that proved nothing more than an *opportunity* for collusion, not that collusion actually occurred or was even likely. This is convincingly demonstrated by the documentary evidence cited by the Fifth Circuit. Although the documents showed discussion of other topics, they mentioned the challenged freight practices on only one occasion and negated collusion in that isolated instance.

Because an opportunity to conspire may never lead to collusion, several courts of appeals have applied the principles underlying *Theatre Enterprises* to hold that evidence of "opportunity contacts," like paralled business conduct, is also too inconclusive to support a finding of conspiracy. Commercial, social and civic contacts afford numerous "opportunities" for conspiracy, but they can serve legitimate ends as well. Accordingly, these courts have ruled that conspiracy can properly be inferred only where the parallel business practices are themselves incompatible with what would be expected under competitive conditions. This rule requires a showing that the parallel conduct would be against each firm's self interest if undertaken independently, and would be in the firm's interest only if undertaken collectively.

Although this Court has not directly addressed the issue, this rule accords with *Theatre Enterprises* and related decisions and squares with sound economic principles. It also requires reversal in this case. It is undisputed that the initial use of West Coast freight and standard weights in the quotation of plywood prices was a natural and competitive development. The parallel adherence to those freight conventions in later years was equally compatible with the

independent and competitive self interest of each producer. The format was preferred by buyers, promoted ease of price comparison, and had no inhibiting effect on competition in mill and delivered prices. The Fifth Circuit made no effort to evaluate the verdict and instructions in light of these pivotal considerations. Had it done so, it would have found that the evidence was insufficient to sustain the conspiracy findings.

II.

The measure of damages found by the jury must also be set aside as contrary to settled antitrust damage law and rational economic analysis. Antitrust damages are properly measured by the difference between the price a plaintiff actually paid for the product as a result of the asserted conspiracy and the price he would have paid for the product in a competitive market. Here, the product being purchased was plywood. Nevertheless, the jury was led by the trial court to focus solely on the freight element of plywood prices and to find that damages were to be measured by the difference between West Coast freight and actual freight for purchases of southern plywood, and the difference between standard weights and actual weights for purchases of western plywood. In the instructions on both impact and measure of damages, the jury was never told to consider whether, or to what extent, these freight differentials translated into higher delivered prices paid by purchasers for their plywood. Nor did the Fifth Circuit consider this decisive issue in its review of the verdict.

The failure to instruct the jury to assess the effect on delivered plywood prices was clearly prejudicial. Because of the acknowledged competition in mill prices, southern plywood prices progressively dropped below West Coast prices. In the process, the freight differential between West Coast and actual freight was passed on to buyers in the give and take of negotiations over mill prices. The same competitive forces reduced or wholly eliminated the standard versus

actual weight differential.

This is precisely what economic theory posits in a competitive market. It led the Ninth Circuit on a parallel record to find "a complete absence of meaningful evidence . . . that price levels in the southern plywood industry reflect an anti-competitive effect." (637 F.2d at 579, Pet. J.A., J-12) It explains why no plywood buyer, including respondents, testified to any adverse effect on plywood prices from the use of the West Coast freight or standard weight conventions.

III.

The trial judge's failure to charge the jury on the proper measure of damages was an integral part of his irregular handling of this issue generally. Petitioners tried these cases on the justifiable understanding that damages, including their appropriate measure, had been severed for later trial. Petitioners' belief was predicated on the trial court's pretrial orders, its statements to the jury, and the recognized distinction between fact of damage (which is a liability issue) and measure of damages (which is a remedial issue). The court's *sua sponte* decision at the close of the evidence to submit the measure of damages to the liability jury violated petitioners' constitutional right to notice and a fair opportunity to be heard on this critical issue.

This denial of basic procedural fairness was exacerbated by the leading form in which the trial court submitted the issue to the jury. The court prepared interrogatories on its own initiative that asked the jury to accept or reject only a single measure of damages: the freight differentials. Because no alternative measure was offered to the jury, nor any instructions given on how such a measure could be arrived at, the jury was presented with an all-or-nothing choice that led inexorably to its adoption of the court's proposal. The jury was precluded from considering the correct measure of damages that petitioners urged when objecting to the interrogatories—the difference between the total price paid for plywood as a result of the alleged con-

spiracies and the total price that would have been paid in their absence.

* * *

These legal errors reflect an underlying failure to exercise meaningful judicial supervision when charging the jury and reviewing its verdict. The consequences of this failure are unusually severe in a case such as this, for the risks that accompany any lawsuit are geometrically increased by the substantitive and procedural rules that have evolved in the antitrust context.

First, in order to achieve the prophylactic purposes of the *per se* rule, certain types of agreements are presumptively held to be in restraint of trade even though the particular agreement in suit might have no actual effect on competition. Second, the agreement need not be express; it can be inferred from what is often ambiguous circumstantial evidence. Third, fact of damage is often virtually assumed on the theory that competitors would not "agree" to commit a *per se* offense unless it would have some restraining effect on price. Fourth, an even lesser burden of proof is applied to measure of damages on the ground that the conspirators should not benefit from market uncertainties they themselves created. Fifth, absent co-conspirators are brought into the damage calculus by the rule of joint and several liability, and are kept in by the rule against contribution. Sixth, under expansive class action rules, those entitled to damages can number in the tens or hundreds of thousands. And, finally, actual damages to named plaintiffs and class members are trebled, and attorneys fees and costs awarded.

Petitioners do not contest the correctness of these substantive and procedural rules. We emphasize, however, that they have a compounding effect that greatly aggravates the injustice resulting from an erroneous decision at any level of the analysis. Consequently, careful analysis is required at each stage to ensure that the results fairly reflect the realities of the marketplace and sound economic logic. As shown below,

when applying the substantive standards for inferring a conspiracy and measuring damages, both the trial court and the Fifth Circuit fell far short of this requirement.

ARGUMENT

I. The Jury Was Erroneously Permitted To Infer Industry-wide Conspiracies from Parallel Conduct, Plus Some Inter-firm Contacts, Although the Conduct Was Fully Consistent with Individual Competitive Behavior.

The jury in this case was asked to infer a conspiracy to continue two long-standing practices that were concededly noncollusive at the outset, but that plaintiffs' expert thought became artificial over time. In such a case, a realistic and careful analysis of the challenged business conduct and its surrounding circumstances is necessary, since parallel behavior can be condemned only "[w]here the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." *American Tobacco Co.* v. *United States,* 328 U.S. 781, 810 (1946). *See also,* Sullivan, *Handbook of the Law of Antitrust* 315 (1977). *Compare Catalano, Inc.* v. *Target Sales, Inc.,* 446 U.S. 643 (1980) (where formal agreement exists, no need to examine effect of practice when determining threshold issue of statutory violation).

This analysis is not, as the trial court and Fifth Circuit seemed to believe, purely a jury function in which the jury is cast adrift with open-ended instructions to "consider all the circumstances," with the verdict then insulated from meaningful judicial review. The trial court must determine whether, under the governing legal standards, the inference of conspiracy is sufficient even to go to the jury. The jury must be told what types of circumstantial evidence do and do not warrant an inference of conspiracy. And a reviewing court must determine whether these legal duties have been adequately discharged and whether a rational basis supports the verdict.

In this case, the trial court and the Fifth Circuit abdicated these judicial responsibilities. Because of this failure properly to guide the jury or meaningfully to review its verdict, petitioners stand convicted of participating in two industry-wide conspiracies based on parallel conduct that was wholly consistent with individual competitive decision-making and business contacts that reflect nothing more than an "opportunity for conspiracy." The following discussion will show that this result cannot stand under accepted economic theory and the principles of *Theatre Enterprises* as they have evolved over the past quarter century.

A. Conspiracy cannot be inferred from parallel conduct alone.

In *Theatre Enterprises* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954), this Court first articulated the principle that parallel business conduct, even conduct taken with conscious awareness of a competitor's actions, is insufficient to find conspiracy. Affirming the trial court's refusal to direct a verdict for plaintiff based solely on such conduct, the Court held:

> "To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. [citations omitted] But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." (*Id.* at 540-41, fn. omitted)

First National Bank v. *Cities Service Co.*, 391 U.S. 253 (1968), took the logical next step, holding that evidence of parallel business conduct was insufficient to allow the plaintiff to go to the jury. The Court found that defendant's refusal to purchase the plaintiff's Iranian oil, although paralleling the refusals of other oil companies, was explained by defendant's independent business interests. In affirming summary judgment for the

defendant, the Court observed: "[N]ot only is the inference that Cities' failure to deal was the product of factors other than conspiracy at least equal to the inference that it was due to conspiracy, thus negating the probative force of the evidence showing such a failure, but the former inference is more probable." (*Id.* at 280)

The rationale behind the now settled rule that parallel business conduct, without more, cannot support a finding of conspiracy is that such conduct can be entirely consistent with competitive behavior. Indeed, in a perfectly competitive market, all firms would charge the same price, and all firms would quote price in the format preferred by customers. As one court remarked when discussing *Theatre Enterprises,* "Like businesses are generally conducted alike," and "similarity in operations lacks probative significance unless present 'under circumstances which logically suggest joint agreement, as distinguished from individual action.'" *Independent Iron Works, Inc.* v. *United States Steel Corp.,* 322 F.2d 656, 661 (9th Cir. 1963) (citation omitted). *See also Report of the Attorney General's National Committee To Study the Antitrust Laws* 38-39 (1955); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals To Deal,* 75 Harv. L. Rev. 655, 658 (1962); Sullivan, *Handbook on the Law of Antitrust* 315 (1977)[18]

[18] The rule that parallel conduct is insufficient by itself to infer conspiracy applies to cases, like the present, involving a parallel method of price quotation. As the Ninth Circuit remarked, when the FTC appeared some years ago to be moving in such cases toward reliance on pure conscious parallelism under § 5 of the FTC Act, a "storm of protest" arose from Congress and industry, which prompted a return to the traditional requirement that something more be shown. (637 F.2d at 576, Pet. J.A., J-6 to J-7) An example of the proper approach is this Court's condemnation of a parallel basing point pricing system when a conspiracy to fix the ultimate price was confirmed by other circumstantial evidence, including uniform delivered prices and "collective methods" to enforce compliance with the pricing formula, such as boycotts, discharges of intransigent employees, retaliatory price cuts, and the like. *FTC* v. *Cement Institute,* 333 U.S. 683, 710, 715-16 (1948).

In direct conflict with these established principles, the jury in this case was allowed to sweep the vast majority of the southern plywood producers into the alleged West Coast freight conspiracy, and an even larger number of producers nationwide into the supposed standard weight conspiracy, *based solely on their parallel use of the challenged freight quotation format.* As the trial court acknowledged, there was nothing upon which to rest the conspiracy findings against these producers—or, in turn, petitioners' damage liability for their acts—beyond evidence of a "general nature, to the effect that the challenged practices were industry-wide in scope and were employed by all manufacturers." (Pet. J.A., C-3)

It is a measure of the Fifth Circuit's casual approach to the conspiracy issue that the industry-wide conspiracy findings were affirmed with no discussion whatever. The trial court at least recognized that they posed "a difficult problem," but sought to rationalize the result by analogy to the questionable rule adopted in some "criminal cases that, once a conspiracy is sufficiently established, only slight evidence is required to support a jury finding that a particular co-conspirator is connected with it." (Pet. J.A., C-3 to -4) Since the trial court's ruling, even the Fifth Circuit has concluded that this "slight evidence" rule violates due process. Accordingly, it has overruled the cases relied on by the trial court, and "*banished*" the rule from "the jurisprudence of the Fifth Circuit." *United States* v. *Malatesta*, 590 F.2d 1379, 1382 (5th Cir. 1979) (en banc) (emphasis in original).[19] The rule has fared no better in the civil antitrust context. *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 513 F. Supp. 1100, 1170 (E.D. Pa. 1981) ("connecting particular defendants to the alleged conspiracy" requires proof by "a preponderance of the evidence," not by slight evidence; parallel conduct does not meet this test).

In short, the only evidence connecting most of the producers to the asserted conspiracies was their parallel

[19] For similar decisions from other circuits, see *United States* v. *Cooper*, 567 F.2d 252 (3d Cir. 1977); *United States* v. *Dunn*, 564 F.2d 348, 357 (9th Cir. 1977).

conduct, and the trial court so acknowledged. It follows under *Theatre Enterprises* that the jury verdict cannot stand to the extent it holds petitioners liable for the actions of those producers.

B. "Opportunity contacts," without more, cannot support an inference that parallel conduct was in fact conspiratorial.

Applying the principles of *Theatre Enterprises*, several courts of appeals have held that "conscious parallelism" is not transformed into illegal "conspiracy" merely by the addition of inter-firm communications affording an opportunity to conspire. For example, in *Venzie Corp.* v. *United States Minerals Products Co.*, 521 F.2d 1309, 1313 (3d Cir. 1975), the Third Circuit affirmed a j.n.o.v. for defendants, stating:

> "[W]hile proof of contacts between the manufacturer and its licensee during the crucial summer period may demonstrate an opportunity for formation of a conspiracy, such an opportunity is significant only if other evidence permits an inference that an agreement did in fact exist. Thus, it is necessary to review plaintiffs' other evidence before the importance of the contacts between defendants and the inferences the jury might legitimately draw therefrom may be determined."

More recently, in another parallel conduct case, the Third Circuit explained: "Human experience does not support the inference of actual conspiracy from proof of the basic fact of opportunity to conspire." *Tose* v. *First Pennsylvania Bank*, 648 F.2d 879, 894 (3d Cir.), *cert. denied*, 102 S.Ct. 390 (1981).

The Seventh Circuit has similarly held that "opportunity to conspire, even in the context of parallel business conduct," is not sufficiently probative to defeat summary judgment unless the absence of a legitimate business justification shows that conspiracy is "the compelling, if not exclusive, rational inference." *Weit* v. *Continental Illinois Nat'l Bank & Trust Co.*, 641 F.2d 457, 462-63 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 610 (1982).[20] Likewise, the Second Circuit reversed a jury verdict

[20] *Cf. Cities Service*, where this Court affirmed summary judgment

for plaintiffs on the ground that "a mere showing of close relations or frequent meetings between alleged conspirators...will not sustain a plaintiff's burden absent evidence which would permit the inference that these close ties led to an illegal agreement." *H. L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981).

The refusal to treat opportunity contacts as sufficient to infer conspiracy is grounded on a realistic appreciation of the complexities of today's business world. Competitors are often engaged, as in the plywood industry, in legitimate intercompany sales that necessitate both contact and exchange of business information. They may also participate in joint ventures. *United States* v. *Morgan*, 118 F.Supp. 621 (S.D.N.Y. 1953). Trade associations and trade shows are another example of inter-firm contacts whose lawful purposes preclude an inference of collusion from "opportunity contacts" alone. *See Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U.S. 563 (1925); *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *Schoenkopf* v. *Brown & Williamson Tobacco Corp.*, 483 F. Supp. 1185, 1189-92 (E.D. Pa.), *aff'd*, 637 F.2d 205 (3d Cir. 1980). Competing firms may also meet to discuss their response to labor union demands, *Kennedy* v. *Long Island R.R.*, 211 F.Supp. 478 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963); *United States* v. *General Motors Corp.*, 1974-2 Trade Cas. ¶ 75,253 at p. 97,667 (E.D. Mich. 1974), or to check customer credit, *Cement Mfrs. Protective Ass'n* v. *United States*, 268 U.S. 588, 593 (1925). And, of course, there are the "civic, charitable and government sponsored activities in which, in today's times, senior business executives are often asked to participate...." *United States* v. *General Motors Corp.*, 1974-2 Trade Cas. at p. 97,668.

Competing firms often use their inter-company contacts as a means of competitive intelligence gathering, so that they

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for defendant despite its communications with two other alleged conspirators when it purchased "a large supply of oil from Kuwait at a price even lower than that petitioner could offer Cities." (391 U.S. at 260)

can best one another in the marketplace. *E.g., National Auto Brokers Corp.* v. *General Motors Corp.,* 1976-2 Trade Cas. ¶ 61,211 (S.D.N.Y. 1976), *aff'd,* 572 F.2d 953 (2d Cir. 1978), *cert. denied,* 439 U.S. 1072 (1979). Even in the sensitive area of price communications, this Court has remarked: "The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive." *United States* v. *United States Gypsum Co.,* 438 U.S. 422, 441 n.16 (1978). *See also United States* v. *Citizens & Southern Nat'l Bank,* 422 U.S. 86, 113 (1975).

Because inter-firm contacts are so pervasive and can serve legitimate ends, a rule which would treat them as the necessary "plus" for a finding of conspiracy from parallel practices would be unsound. It would also have the practical effect of holding, contrary to *Theatre Enterprises* and *Cities Service,* that parallel conduct is alone sufficient to infer conspiracy. Given the extraordinary costs associated with treble damage claims and their defense, such a rule would have a chilling effect on lawful, procompetitive business conduct. *Cf. Texas Industries, Inc.* v. *Radcliff Materials, Inc.,* 451 U.S. 630, 637 (1981); *United States* v. *United States Gypsum Co.,* 438 U.S. at 441.

The Fifth Circuit did not discuss the preceding principles regarding opportunity contacts, although they were called to its attention. (Brief of Appellants to Fifth Circuit, at 52-53) It can only be surmised that the court thought any discussion was unnecessary because of what it characterized as the "direct evidence of communication between high-level personnel on pricing policy." (655 F.2d at 634, Pet. J.A., A-9) If so, the Court operated on a fallacious premise. It confused "direct evidence of communication" with "direct evidence of conspiracy."

This was a crucial legal error. Where "direct evidence of conspiracy" establishes overt agreement, it is usually unnecessary to look to other circumstances to see if the challenged conduct is consistent with what might otherwise

be expected in a competitive market. Because the proof of collusion is direct, even inconsistent circumstantial evidence will generally be unavailing. Here, however, there was no "direct evidence of conspiracy." No document or testimony established that petitioners had actually agreed to use West Coast freight or standard weights in the pricing of their products.[21] Rather, there was only "direct evidence of communication" that offered at most an opportunity for conspiracy, but no proof that collusion actually resulted.

The inability to draw a valid inference of conspiracy from such evidence is convincingly demonstrated by an examination of the very memoranda which the Fifth Circuit thought so "damaging." (655 F.2d at 633, Pet. J.A., A-6 to A-8) The first, an internal Weyerhaeuser document, proves the point as well as any. The Fifth Circuit quotes in full the memorandum's opening paragraph:

> "Jim, my apologies for the delayed response on our various conversations regarding Georgia-Pacific. As you know, at the American Plywood Association meeting in Biloxi, Mississippi I made it a point to spend considerable time with [Georgia-Pacific plywood sales managers] Tom Nash and Bill Fuller. The following outlines the highlights of our conversations which ranged from customer commitments to plywood marketing practices." (655 F.2d at 633, Pet. J.A., A-6)

The Court then jumps over what was specifically discussed in the memorandum, and continues: "The memo concludes with the following assurance: 'The communication channels developed through Tom Nash and Bill Fuller offers [sic] an opportunity to secure specific competitive information. Therefore, it is my intention to keep this direct contact open

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[21] At trial, respondents did introduce contracts for the sale of plywood among petitioners and other producers, which incorporated the same West Coast freight and standard weight provisions used with non-producer customers. Respondents' argument that these buy-sell agreements, which are common in many industries, constituted "contracts in restraint of trade" is specious. (See Tr. 2940-41).

through weekly phone conversations.'" (*Id.*, Pet. J.A., A-7)

Strikingly absent from the Court's discussion is any mention of West Coast freight or standard weights, let alone any hint of a conspiracy regarding their use. *The reason is that the memorandum itself nowhere mentions either topic!* [22]

Indeed, the subject of standard weights is never mentioned in any of the other five memoranda cited by the Fifth Circuit.[23] The subject of West Coast freight is mentioned on a single isolated occasion in PX 174, another internal Weyerhaeuser memorandum. The document itself, however, undermines any notion of collusion. The memorandum reads in its entirety:

> "Georgia-Pacific Co. has in production a mill at Russellville, SC and the plywood being produced is being pushed locally.
>
> "They have adopted the following price basis. Low Crow's [one of the independent price reporting services] less 5% less 3% plus West Coast freight. This applies [sic] in truck lots (Mill) &/or pick up at the local Columbia warehouse. At the moment they are taking orders as of Thursday and shipping from mill on Tuesday. How long this instant service will last remains to be seen.
>
> "This being reported for is [sic] surely will affect the sale of our plywood in this area. As more detail, and the competitive situation develops will follow up this report."

Not only does the passing reference to "West Coast freight" warrant no inference of conspiracy on that or any

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[22] PX 180, J.A. p. 401 (Tr. 364, 2660-62). The topics which were treated in the memorandum reflect only the competitive intelligence gathering normal among many businessmen. There is no suggestion in the memorandum of collusion on any of them.

[23] PX 10, J.A. p. 385 (Tr. 773, 774); PX 29, J.A. p. 388 (Tr. 2193); PX 174, J.A. p. 398 (Tr. 346, 347); PX 175, J.A. p. 399 (Tr. 348); PX 182, J.A. p. 405 (Tr. 372, 2660-62).

other subject, but the tenor of the memorandum suggests quite the opposite. The memorandum obviously represents the efforts of a local Weyerhaeuser representative, concerned that Georgia-Pacific's "instant service" activities "will surely affect the sale of our plywood in this area," to report as best he can on competitive developments *that have already taken place in the market.* Such competitive intelligence gathering has been repeatedly held proper. *E.g., National Auto Brokers Corp.* v. *General Motors Corp.,* 1976-2 Trade Cas. ¶ 61,211 (S.D.N.Y. 1976), *aff'd,* 572 F.2d 953 (2d Cir. 1978), *cert. denied,* 439 U.S. 1072 (1979).

Respondents can be expected to urge that there is other evidence beyond the six memoranda to support their conspiracy case. But the Fifth Circuit felt that the six were at least representative of, if not more compelling than, the rest. Moreover, the added evidence cited by respondents in opposition to the petitions for certiorari was of precisely the same character as the six memoranda. (See Reply of Weyerhaeuser and Willamette in Support of Certiorari, at 4-5) The same is true of the scattered memoranda apparently viewed by respondents as sufficiently significant to include in the joint appendix.

Finally, there is no need to exhaust the record to test the legal standard for review. It is evident that the type of intercompany communications thought important by the Fifth Circuit represented opportunities for conspiracy only. There are sound reasons for rejecting such evidence as a sufficient basis for inferring conspiracy. Like parallel conduct, opportunity contacts can be as consistent with competition as collusion. Ambiguous conduct plus ambiguous communication do not add up to conspiracy; something more convincing is required.

C. Conspiracy may properly be inferred only where parallel conduct is inconsistent with independent competitive behavior.

The proper standard for determining if parallel conduct justifies a finding of conspiracy is whether the challenged conduct runs counter to what would be expected in a competitive market—*i.e.,* whether it would be advantageous for a

particular firm only if collusively followed by other firms as well. This rule is especially appropriate in a case, such as this, which attacks the *continuation* of a practice that was concededly innocent when it originated.

The need to focus on whether the challenged parallel conduct is consistent or not with competitive behavior is implicit in this Court's trilogy of "conscious parallelism" cases of over a quarter century ago. In *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939), for example, a conspiracy was inferred where the defendants radically departed from prior business practice by their parallel adoption of pricing and distribution practices that were unexplainable as competitive decisions by individual firms. To the contrary, "each knew that cooperation was essential to successful operation of the plan." (*Id.* at 226) As the Court subsequently explained, only uniform parallel conduct by *all* defendants "would enable them to increase their royalties by forcing a rise in admission prices without the danger of competitors enlarging their share of the subsequent-run market by refusing to impose similar restrictions." *Cities Service*, 391 U.S. at 287.

Similarly, in *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946), the three major cigarette makers simultaneously raised prices in identical increments at a time when demand was declining and leaf tobacco prices reached their lowest level in 25 years. (*Id.* at 805) Had only one manufacturer done so, it would have rapidly lost sales to the other two.

In contrast, while the evidence in *Theatre Enterprises* showed that all the defendant distributors had denied first-run films to plaintiff's suburban theatre, it also showed that sound business reasons existed for each defendant individually to take that action due to the greater profitability of licensing the films to downtown theatres. (346 U.S. at 540) The teaching of the case, as Professor Turner has remarked, is that "conscious parallelism is not even evidence of agreement unless there are some other facts indicating that the decisions of the alleged conspirators were *interdependent*, that the decisions were consistent with the individual self-interest

of those concerned only if they all decided the same way." Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 658 (1962) (emphasis in original).

Several circuits have similarly read the principle underlying these decisions when ruling that alleged conspirators were entitled to judgment as a matter of law. In *Proctor* v. *State Farm Mut. Automobile Ins. Co.*, 675 F.2d 308 (D.C. Cir. 1982), for example, the D.C. Circuit recently articulated the standard as follows:

> "Only when the observed parallel behavior is inconsistent with the behavior to be expected from each actor individually pursuing its own economic interest may an agreement be inferred from the parallel conduct." (*Id.* at p. 327)

The *Proctor* decision is particularly forceful precedent because of its close factual parallels to the present case. The claim there was that the defendant insurance companies had agreed to "*a common formula* for reimbursing their insureds for the cost of automobile damage repair work," and to '*standardized estimates* of the time necessary to complete repair work." (*Id.* at 311 & n.3; emphasis added) Beyond the parallel use of the formula and estimates, plaintiffs claimed to have offered "direct evidence" of defendants' conspiracy in the form of documents allegedly memorializing "meetings in which they agreed to a common formula to be used in the adjusting and settling of automobile damage repair claims." (*Id.* at 328) In affirming summary judgment for the insurance companies, however, the D.C. Circuit found that the proferred evidence, like that here, consisted either of interfirm discussions of other matters or documents that "suggest, *at most*, parallel business behavior which would be in the economic self-interest of each appellee." (*Id.* at 328-30; emphasis in original).

The same rationale was employed by the Third Circuit to affirm summary judgment for defendants in *Tose* v. *First Pennsylvania Bank*, 648 F.2d 879 (3d Cir.), *cert. denied*, 102

S.Ct. 390 (1981). The Court held that, when a plaintiff claims that "concerted action may be inferred from evidence of parallel business behavior," even when accompanied by "ample proof of opportunity to conspire," it must make " 'a showing of acts by defendants in contradiction of their own economic interest.' " *Id.* at 894, *quoting Venzie Corp.* v. *United States Mineral Products Co.*, 521 F.2d 1309, 1314 (3d Cir. 1975). To the same effect, see *Weit* v. *Continental Illinois Nat'l Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), *cert. denied*, 102 S.Ct. 1610 (1982); *Admiral Theatre Corp.* v. *Douglas Theatre Co.*, 585 F.2d 877, 884 (8th Cir. 1978); *Independent Iron Works* v. *United States Steel Corp.*, 322 F.2d 656, 661 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963); *Chorak* v. *RKO Radio Pictures*, 196 F.2d 225, 229 (9th Cir.), *cert. denied*, 344 U.S. 887 (1952); *Workman* v. *State Farm Mut. Automobile Ins. Co.*, 520 F. Supp. 610, 620 (N.D. Cal. 1981); *Harlem River Consumers* v. *Associated Grocers*, 408 F. Supp. 1251, 1278 (S.D.N.Y. 1976).

The rule suggested by this Court's decisions and adopted by these circuits rests on sound economic, as well as legal, principle. What distinguishes collusive from innocent parallel behavior is the presence or absence of a need for collective action. A classic price fixing conspiracy, as an example, is accomplished when suppliers hold down output so that demand pushes prices to the agreed level. For the conspiracy to be effective, all or most sellers must participate. If an individual firm raised prices or cut output, while its competitors maintained theirs, it would simply lose sales without having any appreciable effect on price. Only if each firm foregoes its individual interest can the collective goal of the cartel be accomplished. Given these economic axioms, a Sherman Act conspiracy can rationally be inferred only where sellers engage in conduct that would be against each firm's self interest if undertaken independently, and would be in each firm's interest only if undertaken collectively—the same standard adopted by the Third, Seventh, Eighth, Ninth and D.C. Circuits.

Both the district court and the Fifth Circuit rejected such a standard. The trial court refused petitioners' proposed instruction which stated:

> "In order to show a conspiracy existed by circumstantial evidence, the plaintiffs have to come forward with significant evidence of two things. First, the plaintiffs must show that all of the defendants acted alike. Second, the plaintiffs must show that any similar actions by the defendants were contrary to those defendants' independent business interests. That is, the evidence must show that each defendant manufacturer would not have engaged in the business practices by itself unless all of the other manufacturers did the same thing." (J.A. p. 156-57)

Instead, the trial judge instructed the jury that it could take this factor into consideration, but that its absence did not indicate "there wasn't a conspiracy."[24]

On appeal, the Fifth Circuit fully endorsed the trial court's instructions. (655 F.2d at 637, Pet. J.A., A-14, A-15) Moreover the court gave no consideration to the overwhelming evidence that the challenged pricing practices were fully consistent with petitioners' independent business interests, precisely as the Ninth Circuit had found on the similar

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[24] The relevant portion of the charge stated:

> "Now, the mere fact, if it be a fact, that some practice was being followed that was artificial or arbitrary or unduly complicated, that fact in and of itself would not mean that it was a product of a conspiracy any more than would the fact, if it be a fact, that the practices were logical and convenient and helpful indicate that there wasn't a conspiracy. These would simply be factors that you would take into consideration in the totality of the evidence in deciding whether or not to draw the inference that these matters came about not as a result of the decision by the individual companies that it was in their best interest to do so, but whether they did so because of some express or implied commitment and agreement from others to do likewise." (Tr. 3541, J.A. pp. 187-88)

record in the FTC proceedings. It is undisputed that, when plywood first was produced in the South, the major competition continued to come from the West. Consequently, regardless of what other southern mills did, a particular southern producer would find it individually advantageous to express his price in the form which was most familiar to potential customers and which enabled those customers easily to see that the seller's delivered price was lower than those of western competitors.

This was equally true after the southern plywood industry became better established. Southern capacity gradually expanded enough to satisfy southern demand, and the progressively lower southern prices drove western producers from the South. At the same time, southern plywood regularly competed with western plywood in the large mid-western and eastern markets, where the southern freight advantage was reduced. As with southern customers in earlier years, these mid-western and eastern customers were accustomed to the West Coast pricing format. Consequently, the continued use of the pricing format by each individual southern mill remained the most effective way for that particular mill to convey its lower prices.

Similar reasons continued to apply even to sales in the South. At all times the western producers remained the dominant suppliers of *sanded* plywood, which accounted for about one half of the plywood bought in the South. Thus, customers were receiving quotes under the West Coast freight format for a major portion of their plywood purchases. A change in pricing format by a southern producer on *sheathing* plywood would have resulted in dual freight quotation formats that would have increased the producer's information costs while having no effect on the delivered price. A southern producer who abandoned the customary method of quotation also risked losing the business of buyers who had long been accustomed to and preferred the prevailing industry practice. As Professor Turner notes, "Consciously parallel decisions by competitors which are induced

by the demand of a buyer . . . should not be held to constitute horizontal agreement . . . ." (75 Harv. L. Rev. at 706)[25]

This last point underscores the need for the kind of careful economic analysis eschewed by the Fifth Circuit. As noted earlier, the success of a price fixing conspiracy depends upon adherence by all participants to its price and supply restrictions. A corollary is that each participant has an individual incentive to "cheat." This can take the form of maintaining one's prior output level or shaving one's price. II P. Areeda & D. Turner, *Antitrust Law* ¶ 405(b)(2) (1978). The lack of collusion in the southern plywood industry is demonstrated by the absence of any incentive to "cheat" by quoting under a different pricing format. If a single southern producer had switched to a higher "mill" price and a lower "freight" charge, it would not have reaped increased benefits. To the contrary, it would have lost sales and profits by confusing customers and incurring additional information costs as it tried to explain the new format.[26]

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[25] Professor Turner's observation thus removes suspicion from delivered pricing formats, which both he and Professor Areeda would otherwise view with skepticism, where the format is preferred by customers. Both authors make clear, moreover, that their general concern with delivered pricing formats is that, *when combined with uniform base prices,* they may "facilitate noncompetitive pricing." P. Areeda, *Antitrust Analysis* 383 (1981); Turner, 75 Harv. L. Rev. at 674-75. No such contention was made here. Additionally, a ground-breaking economic study has recently established that "the use of freight-absorbing basing-point prices may arise in a competitive industry at least as readily as in a poorly cartelized one." Haddock, *Basing Point Pricing: Competitive vs. Collusive Theories,* 72 American Economic Review 289, 293 (1982).

[26] The situation is similar to sellers of milk whose customers are used to dealing in quarts. To switch to liters (which are slightly larger) would make the aberrant seller's price seem higher than its competitors' in the eyes of any buyer who did not look carefully. In such circumstances, parallel adherence to the traditional quart sales is no evidence of conspiracy.

The need to examine the nature and effect of the challenged conduct is particularly acute here, for several other economic indicia also point to the presence of competition and the absence of collusion:

No sudden change in business practices. In the typical inferred conspiracy case, suspicions arise because the defendants "with substantial unanimity [make] far-reaching changes in their business methods." *Interstate Circuit,* 306 U.S. at 223. In contrast, the parallel conduct in this case was merely the *continuation* of an industry convention that even the FTC agreed was "innocent" in origin, "evolve[d] in a justifiable way," and continued largely through "force of habit." (91 F.T.C. at 102)

Expansion of supply. A classic price fixing conspiracy operates by joint efforts to restrict supply. (Pp. 43, 46, *supra.*) Throughout the asserted conspiracy period, however, plywood production capacity was rapidly and substantially increasing as new southern mills came on stream.[27]

Large number of producers. Tacit conspiracies seldom exist where participation of a large number of firms is required. The larger the conspiracy, the more opportunities for cheating and the greater the need for elaborate "policing" mechanisms. *See* Hay & Kelly, *An Empirical Survey of Price Fixing Conspiracies,* 17 Journal of Law and Economics 13 (1974). In this case, there is no evidence of policing despite the presence of an unwieldly 33 named defendants and 91 other plywood producers who also engaged in the challenged conduct.

Widely fluctuating prices. One hallmark of a price fixing conspiracy is unnaturally stable prices. *American*

[27] The first southern mill opened in early 1964. By the end of that year there were three mills; by the end of 1965 there were 12; by the end of 1968 there were 28; by the end of 1975 there were 55; and at the time of trial "there were perhaps 70—59 plywood mills with more under construction." (Tr. 2889-90. See also Tr. 2947-48)

> *Tobacco,* 328 U.S. at 804 (only seven price changes in 18 years); *C-O-Two Fire Equipment Co.* v. *United States,* 197 F.2d 489 (9th Cir.), *cert. denied,* 344 U.S. 892 (1952). The uncontradicted evidence here is that plywood was sold on an "auction" basis with prices changing weekly and even daily. (P. 9, *supra.*) As one class member put it, when he received printed price lists he would "throw them in the waste basket" because "they are no good, generally five minutes after they are printed, and by the time we get this in the mail, it's irrelevant to what that price is." (Tr. 2743)

Against a competitive background such as this, there can be no inference of collusion absent convincing proof that the parallel conduct was incompatible with independent decision-making. This question must be addressed when determining whether the case should go to the jury, when charging the jury, and when reviewing the verdict on post-trial motions and appeal. The untoward result of the lower courts' failure to conduct the required analysis at any of these stages is that, under a statute which is primarily a "consumer welfare prescription" (*Reiter* v. *Sonotone Corp.,* 442 U.S. 330, 343 (1979)), the jury was allowed to outlaw a price quotation format that not a single buyer testified affected prices adversely and that several endorsed as a procompetitive means of facilitating price comparison. (637 F.2d at 580, Pet. J.A. J-14) Such an aberrational outcome underscores the need for this Court expressly to adopt the standard that parallel conduct, whether or not accompanied by opportunity contacts, is insufficient to infer conspiracy unless the conduct is inconsistent with independent competitive behavior. On the facts of this case, this standard requires reversal of the judgment below.

II. The Jury Was Incorrectly Allowed To Assess Damages Without Reference to the Challenged Practices' Effect on the Total Price for Plywood.

The lower courts' failure to consider the realities of the plywood market led to an equally aberrational result on

measure of damages. Purchasers of plywood were buying just that—plywood, not freight. They could have been injured by petitioners' pricing format only if it caused them to pay more for their plywood. For example, it is of no economic consequence to a buyer paying $100 for plywood whether that price is expressed as an $85 mill price plus $15 in West Coast freight, or a $90 mill price plus $10 in actual freight, or simply a delivered price of $100. The bottom line is the same. The buyer would be injured only if the different pricing formats somehow resulted in different delivered prices.

The Fifth Circuit, however, approved a measure of damages geared solely to the freight component of plywood prices without any consideration of whether, or to what extent, there was an effect on the ultimate delivered price paid by respondents and other buyers for their plywood. In so doing, the court ignored the fundamental principle that damages in antitrust price fixing cases must measure the difference between the price actually paid for the product at issue and the price that would have been paid absent the alleged conspiracy.

A. Antitrust damages must measure the difference between the price actually paid for the product and the price that would have been paid absent the alleged conspiracy.

The primary purpose of any damage recovery is compensation—putting the plaintiff in the same position in which it would have been absent the defendant's wrong-doing. McCormick, *Damages* 560 (1935); Corbin, *Contracts* § 992 (1964); *Restatement (Second) of Torts* § 901 (1979). A related theme is that damages must be based on a *rational theory* which relates the compensation to the alleged injury and which is supported by evidence sufficient to take the damage calculation beyond the realm of speculation and guesswork. *McCormick, supra* at 101. The rule against speculative damages manifests a "pervading insistence that the jury must be furnished with some yardstick, rough though it be, which they can use in making their award and by which

their award can be tested." (*Id.*)

Antitrust damage law is guided by these same fundamental principles. When computing the single damages to be trebled, courts must focus on "the injury actually proved," *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477, 485-86 (1977), and plaintiffs must establish "a reasonable basis of computation" for measuring the harm, *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927). Because Section 4 of the Clayton Act "is essentially a remedial statute," damages must be measured by a realistic appraisal of "what plaintiff's situation would have been in the absence of the defendant's antitrust violation." *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 562, 566 (1981). Professors Areeda and Turner have summarized the general rule as follows:

> "To find the damage attributable to an antitrust violation, we must compare the plaintiff's actual situation with the hypothetical situation that would have existed in the absence of the violation." (II P. Areeda & D. Turner, *Antitrust Law* ¶ 344 (1978))

In price fixing cases, this rule requires that damages be measured by "the difference between the price actually paid and the one at which the product would have been sold absent the conspiracy." *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), *citing Chattanooga Foundry and Pipe Works* v. *Atlanta*, 203 U.S. 390, 396 (1906); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). *See also* Adams & Bock, *Damages in Horizontal Price Fixing Cases*, 49 Ant. L.J. 141, 142 (1980).

These principles are no less relevant where defendants are claimed to have fixed only one element (here, freight) of the overall price of a product (here, plywood). In order to determine the injury actually suffered by buyers, the measure of damages must be based on the inflation, if any, of the price "at which *the product* would have sold absent the conspiracy." *Berkey Photo*, 603 F.2d at 297. The inquiry cannot be confined solely to the one element that allegedly was fixed, for the

inflation of that single element might very well not carry over into the total price of the product.

This Court suggested just this approach in *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980), where it observed that an agreement on one pricing element might "ultimately lead in a competitive market to corresponding decreases in the invoice [i.e., base] price." Indeed, the decreases in other pricing elements may correspond so closely that the agreement to fix the single element "may turn out to be harmless" to the buyer. (*Id.* at 648-49)

The need to examine the relationship between various pricing elements to determine the effect on total price is not unique to single element price fixing cases. As this Court observed in a tie-in case: "Proof that [plaintiff] paid a higher price for the tied product is consistent with the possibility that the financing [the tying product] was unusually inexpensive and that the price for the entire package was equal to, or below, a competitive price." *United States Steel Corp.* v. *Fortner Enterprises*, 429 U.S. 610, 618 (1977) (fn. omitted).[28] Similarly, while a plaintiff's participation in an antitrust violation does not bar his suit, the "possible beneficial byproducts of a restriction from a plaintiff's point of view can of course be taken into consideration in computing damages." *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 140 (1968) (pluraiity opinion).

The likelihood that an agreement on freight may not have any effect on the ultimate delivered price, due to offsetting adjustments in the base price, was specifically recognized in *Albertson's, Inc.* v. *Amalgamated Sugar Co.*, 62 F.R.D. 43 (D. Utah 1973), *aff'd in pertinent part*, 503 F.2d 459, 463 (10th Cir. 1974). Responding to a claim that defendants' basing point

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[28] *See also Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43, 52-53 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) (in tie-in case plaintiffs could not base their damages on "the amount by which the contract price [on the tied item] exceeded the market price for comparable items," with no offset for the reasonable value of the tying product, the trademark).

price system fixed the freight element of plaintiffs' purchase price, the court stated:

> "If base point pricing were to be abandoned, *it is clear that [defendants] would have to raise their base price* and not continue to charge the base price at Crockett, California, as the plaintiffs seem to believe.... The evidence indicates that some new base price would have to be set which would maintain the percentage return on capital constant with existing levels if the defendants are to stay in business." (*Id.* at 53; emphasis added)[29]

In sum, a rational economic approach toward antitrust damages must take account of *all* elements of price, and may lead to "no net recovery—a result commanded by the necessity of offsetting injuries which plaintiffs may have suffered at the hands of defendants with benefits which they may have derived from the very activities they attack." Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127, 1136 (1976).

B. Neither the jury nor the courts below examined the effect of the alleged conspiracies on delivered plywood prices.

The trial court and the Fifth Circuit ignored these basic precepts of antitrust damage law. Neither the instructions to the jury nor the opinions below gave any attention to the effect, if any, of the method of freight quotation on the ultimate price paid for plywood or to whether any increase in the freight component may have been offset by reductions in mill prices.

For example, the trial court's instructions can be searched in vain for any indication that this was the jury's task. In its seventy-three page charge, the court did not introduce the subject of measure of damages until the sixty-fourth page.

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[29] *See also Jacobi* v. *Bache & Co.*, 377 F. Supp. 86, 93 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 1231 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976) (although there was agreement to eliminate one form of payment, the fact that other elements of the price were negotiable was "relevant to calculations of the amount of damages").

(Tr. 3555, J.A. p. 195) Then, it devoted only two paragraphs to the subject. And in those two paragraphs, the jury was told only that respondents wanted "yes" answers, and petitioners wanted "no" answers, to the court's leading interrogatories presenting the freight and weight differentials as the only measure. (Tr. 3555-56, J.A. p. 195) Nowhere was the jury told of the fundamental remedial principle that the measure of damages must reflect the difference between the total price paid for plywood and the total price that would have been paid if petitioners had quoted freight on a different basis.[30]

The trial court compounded its failure properly to instruct the jury by failing to exercise any meaningful review of the verdict when ruling on petitioners' motion for j.n.o.v. and a new trial. The court acknowledged it did "not necessarily agree[] with the findings" on measure of damages. (Pet. J.A., C-4) It further expressed doubt about the finding of impact. Yet it allowed the latter finding to be bootstrapped by what it had already conceded was a dubious finding on the measure of damages: "The defendants' challenge upon the adequacy of the findings as to impact might well have merit but for the fact that the jury also responded by special verdict to define and describe that impact." (*Id.* at C-6) Most fundamentally, the trial court never focused on the crucial question of whether delivered prices were any different from what they would have been in a competitive market, and if so by how much.

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[30]The trial court overruled petitioners' objection that the measure of damages must reflect "what the competitive price level would have been absent a particular practice in comparing that with what the actual price level was in the presence of the practice." (Tr. 3573, J.A. p. 205) Likewise, on the impact issue, the trial court rejected petitioners' proposed instruction that the jury must find that a purchaser "paid more for plywood than he would have paid in the absence of unlawful conspiracy." (J.A. 153) Instead, the court opted for the more ambiguous instruction that respondents had to prove "financial damage." (Tr. 3552, J.A. 193)

On appeal, the Fifth Circuit also treated the damages issue summarily. The Fifth Circuit held that, having "proved" impact, respondents' had a "lighter" burden on measure of damages. (655 F.2d at 635, Pet. J.A. A-10) To the Fifth Circuit this burden was light indeed: "'In fact, given proof of the fact of damage, proof of losses which border on the speculative is allowed in order to facilitate the policy of the anti-trust laws.'" (*Id.*, Pet. J.A., A-10, citation omitted) This "borders on the speculative" standard conflicts with the sounder standard employed by the majority of circuits.[31] It also violates this Court's admonition that, even in an anti-trust case, "the jury may not render a verdict based on speculation or guesswork." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). *See also Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 124 (1969). Like the trial court, the Fifth Circuit did not pause to consider whether, under whatever standard applied, the freight differential bore any relationship to the effect on delivered prices.

Consequently, neither the jury nor either of the courts below has ever addressed the crucial damage question: Did the challenged conduct have any effect on actual delivered prices, and if so, how much? No damage award that ignores this crucial inquiry can stand. Nor are the infirmities of the

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[31] Only the First and Fifth Circuits use the "borders on the speculative" formula. *Ford Motor Co.* v. *Webster's Auto Sales, Inc.*, 361 F.2d 874, 887 (1st Cir. 1966); *Hobart Brothers Co.* v. *Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 903 (5th Cir.), *cert. denied*, 412 U.S. 923 (1973). The Second, Third, Seventh, Eighth and Ninth Circuits disallow such conjecture, and instead use a test requiring "a reasonable foundation from which a jury can calculate the amount of damages." *Yentsch* v. *Texaco, Inc.*, 630 F.2d 46, 59 n.19 (2d Cir. 1980); *accord, Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338, 1352-53 (3d Cir. 1975); *City of Mishawaka* v. *American Electric Power Co.*, 616 F.2d 976, 987 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981); *Admiral Theatre Corp.* v. *Douglas Theatre Co.*, 585 F.2d 877, 893 (8th Cir. 1978); *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795, 813 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

damage measure cured by resort to the distinction "between the measure of proof necessary to establish the fact [of] some damage, and the measure of proof necessary to enable the jury to fix the amount." *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931). This distinction is based on the practical recognition that "[t]he vagaries of the marketplace usually deny us *sure knowledge* of what plaintiff's situation would have been in the absence of the defendant's antitrust violation." *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981) (emphasis added). The *Story Parchment* rule of pragmatic approximation of market effects thus allows the jury some leeway in computing damages, but only after it has been given an analytical framework for determining "what plaintiff's situation would have been in the absence of defendant's antitrust violation." It most assuredly does not dispense with the need for such a framework.

As the Seventh Circuit noted in rejecting the use of a damage formula which it found "recommended by its simplicity" but "totally without foundation," the computation of damages "should not be expected to be quite that much easier than the rest of this case." *City of Mishawaka* v. *American Electric Power Co.*, 616 F.2d 976, 987 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981). By losing sight of this, the trial court and the Fifth Circuit approved an "automatic damages" standard similar to that invalidated in *J. Truett Payne*. Whether in a single element price fixing case or a Robinson-Patman case, automatic damages unrelated to actual injuries have no place under Section 4, for "the desire to encourage private enforcement and to penalize antitrust violations is no excuse for awarding damages that are nonexistent. . . ." Areeda, 89 Harv. L. Rev. at 1127.

C. The available evidence demonstrates that the freight differentials were not the appropriate damage measures.

Since the critical damage inquiry was never reached by the jury or the courts below, and since (as discussed more

fully in Part III) evidence on the damages issue was not introduced by either side during the trial, there is hardly a complete record on this point. Nevertheless, what probative evidence is available demonstrates two crucial flaws in a measure of damages based on the difference between West Coast and actual freight and between freight calculated in terms of standard versus actual weights.

First, southern mill prices moved progressively downward relative to western prices, thus passing on the freight savings to the customers. In *Catalano*, this court posited the situation where an agreement on one element of price might "ultimately lead in a competitive market to corresponding decreases in the invoice [*i.e.*, base] price," and thus "may turn out to be harmless." (446 U.S. at 648-49) Such corresponding decreases are precisely what happened here.

When the southern industry was in its infancy and the western producers remained the dominant suppliers, the market price in the South was primarily a function of southern demand and western supply. Southern producers priced at or near the market price, as any rational seller would do, and retained most of the freight savings as profit. Even plaintiffs' expert witness found no fault here. (See pp. 9-10, *supra.*)

As southern capacity gradually expanded to supply southern demand, western plywood became progressively less of a factor in determining market price. Consequently, delivered prices of southern plywood fell relative to those for western plywood as southern producers competed among themselves for nearby customers. Since the southern producers continued to quote delivered prices using West Coast freight, the lower delivered prices made possible by the freight savings were quoted in the form of lower mill prices. (See pp. 11-13, *supra.*)

By early 1967, before the damages period had even begun, southern mill prices for ½ inch standard exterior plywood averaged $2.50 less than western prices. During the damage

period (1968-1973), the gap between the average southern and western mill prices widened from $3.80 to $12.30. For ¾ inch standard exterior plywood, the gap increased from $5.50 in 1968 to $22.20 in 1973. (P. 13, *supra*) Thus, by the end of the damages period the average southern mill prices had dropped, relative to those in the West, by $12.30 for ½ inch exterior plywood and by $22.20 for ¾ inch exterior plywood. These figures strongly suggest that the freight differential was *completely* dissipated through competitive mill pricing. In all events, as even the FTC recognized, "disparities between the base prices of southern and western plywood suggest that the *full* freight differential is not realized as profit by southern mills (as opposed to cost savings for consumers)...." (91 F.T.C. at 103; emphasis in original) Consequently, damages measured by the *full* freight differential are palpably unwarranted.

Second, higher Southern mill prices would have been quoted if the West Coast freight pricing format had not been used. The Ninth Circuit recognized this when it stressed "the commonsense proposition that southern producers would simply adjust the index price upwards if they were quoting delivered prices in terms of actual freight." (637 F.2d at 580, Pet. J.A., J-14) Again, this is precisely what happened here. When the practice of quoting on the basis of West Coast freight was ultimately abandoned, the mill prices were raised correspondingly, and "the actual prices continued much as they had." (Tr. 3168-69)[32]

The actual experience following the abandonment of the pricing format reflects the southern producers' underlying cost structure, which must be examined when arriving at a "competitive price" for purposes of measuring damages. *See, e.g., Albertson's, Inc.* v. *Amalgamated Sugar Co.*, 62 F.R.D. at 53.

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[32] By contrast, "[i]f an economically effective price conspiracy takes place over a long period of time and the industry suddenly becomes competitive, then profits and prices are expected to fall." *In re Folding Carton Antitrust Litigation*, 83 F.R.D. 251, 254 (N.D. Ill. 1978).

Here, the costs of southern mills were higher than those of western mills. For example, the cost difference between Georgia-Pacific's southern and western mills averaged $10.84 per 1,000 square feet from 1968 through 1973. (Vol. 33, pp. 23393-473, Ex. C-1) Meanwhile, the "freight differential" between West Coast and actual freight was generally less than $10, sometimes so much so that producers would have lost money on sales at the quoted mill prices plus actual freight. Dr. Steiner accordingly concluded that, if West Coast freight had not been quoted, southern sellers who wanted to stay in business would have been forced to quote higher base prices before adding the lower southern freight:

> "Otherwise, many southern mills would have been in a loss position for much of the damage period and some of them for all of it. This lower (or negative) return on investment would have curtailed if not eliminated southern plywood production." (*Id.* ¶ 9)[33]

In sum, the decline in southern base prices relative to western prices during the period when west coast freight was still quoted suggests that the freight differential was in fact dissipated by competition in southern mill prices. This conclusion is reinforced by the experience following the switch to quoting actual freight, as well as the southern producers' cost data, which show that higher southern mill prices would have been inevitable if West Coast freight had never been quoted at all. The Fifth Circuit took no account of this. Instead, the Court reduced the entire damage analysis to a single paragraph asserting that it was the jury's prerogative to judge the "credibility" of the parties' experts. A reviewing court's task, however, is not so simple. " '[I]n the real economic world rather than an economist's hypothetical model,' the latter's drastic simplifications generally must be abandoned." *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, 742

[33] See note 9, *supra.*

(1977), *quoting Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 493 (1968).[34]

Here, the simplifications of respondents' expert were drastic indeed. Although a realistic assessment would require an examination of the southern producers' costs, he conducted no such analysis. (*E.g.*, Tr. 2452).[35] Respondents' expert also failed to consider the basic question recognized by *Catalano* and squarely posed by the Ninth Circuit: Did the use of West Coast freight lead to the use of correspondingly lower mill prices, thus having no effect on delivered prices? To the contrary, he disavowed any concern with the delivered price, testifying that it "did not make any difference" to his analysis. (Tr. 2390-93) Likewise, he stated that "I don't believe that it would be essential to assess" "the supply and demand characteristics of the market in order to express the opinions" he gave. (Tr. 2471, J.A. pp. 352-53) Finally, while he made no study of the matter, he conceded that some of the freight advantage enjoyed by southern mills was in fact passed along to customers in the form of lower mill prices. For example, he testified that in the early 1970's southern mill prices were three to four dollars lower than western mill prices. (Tr. 2472, J.A. p. 353) Nevertheless, the Fifth Circuit approved the freight differential as the damage measure based solely on his testimony.

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[34] *See also Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 297 F.2d 906 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962) (the leap required to derive any rational conclusion from the expert's data was too great to allow a jury to take); *Murphy Tugboat Co.* v. *Crowley*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 1713 (1982) (the damage theory has fundamental problems that make it unacceptable as a whole); *Phillips* v. *Crown Central Petroleum Corp.*, 602 F.2d 616 (4th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

[35] Indeed, confirming that respondents shared petitioners' view that measure of damages had been severed for later trial, during the expert's deposition respondents' counsel prevented any questions on this subject, representing that "we are not going into the question of production cost." (*E.g.*, Barber Dep. 169, 171, Vol. 32, p. 22788)

Ungrounded in sound economic analysis, the lower courts' measure of damages inevitably leads to bizarre results. For example, respondents Lyman Lamb Co. and Baton Rouge Lumber Co. received damages of $23.30 per thousand square feet of ½ inch southern plywood purchased in February 1973, even though the industry reporting services showed that this $23.30 freight differential had been more than bargained away in the form of southern mill prices that were $30 cheaper than western mill prices. So too, respondent Plywoods Distributing Co. received damages of $22.67 per thousand square feet of ¾ inch southern plywood purchased in May 1972, even though the southern plywood was already selling for $23 less than western plywood. (See pages 13-14 n.10, *supra*.)

Another anomaly produced by this measure of damages is that, when two purchasers buy plywood on the same day from the same seller, the buyer who paid the higher price can receive the lower damages. This is illustrated by the October 26, 1973 sales made by one of Georgia-Pacific's southern mills to one customer in West Chicago and one in New Orleans. West Coast freight was virtually identical to both customers because West Chicago and New Orleans are in essentially the same western freight zone. However, Georgia-Pacific's actual freight to New Orleans was much lower. Consequently, it quoted the New Orleans buyer a mill (and thus delivered) price that was $17.33 lower than that quoted the West Chicago buyer. (Vol. 32, pp. 23025-26)[36] Under the measure of damages adopted below, however, the West Chicago buyer receives far less in damages even though he paid a higher price, simply because the difference between West Coast freight and actual freight to West Chicago is smaller than the difference between West Coast freight and actual freight to New Orleans. It may work out as a matter of arithmetic, but it makes no sense as a matter of economics.

The freight and weight differentials could serve as the proper measure of damages only if they accurately reflected

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[36] See note 9, *supra*.

the difference between the delivered price as affected by the alleged conspiracy and the delivered price that otherwise would have prevailed. Respondents' expert did not address this issue, the jury was not told to, and the trial court and the Fifth Circuit ignored it. Meanwhile, the evidence available shows that the quoted freight and mill components of delivered prices were inextricably intertwined, with changes in one producing changes in the other. Accordingly, the damages imposed by the district court and accepted by the Fifth Circuit cannot stand.

III. Petitioners Were Denied Due Process by the Trial Court's Improper Handling of Bifurcation and of the Jury Interrogatories.

Reversal of both the measure and award of damages is further required because the trial court's handling of these issues precluded their fair hearing and consideration in contravention of petitioners' due process rights. *First,* petitioners never presented their case on the appropriate measure of damages because of their justifiable understanding that this issue had been severed for subsequent trial. *Second,* the issue was submitted to the jury by the trial court in the form of leading interrogatories that left the jury no realistic choice but to adopt the freight and weight differentials as the damage measures.

A. Petitioners were denied a fair hearing on measure of damages because they reasonably understood it had been severed for later trial.

Petitioners tried these cases to the jury on the clear and reasonable understanding that the first trial would resolve only the traditional antitrust liability issues of whether there was a statutory violation and whether it had some impact on plaintiffs. The measure of that impact, like other damage issues, would be preserved for later trial. This was what the trial court's pre-trial rulings led petitioners to believe, and this was what the court originally told the jury.

Submission of the measure of damages to the liability jury under these circumstances was a denial of petitioners' due process right to notice and opportunity to be heard. As this Court has held: "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan* v. *United States,* 304 U.S. 1, 18 (1938). Consequently, the lower courts agree that the bifurcation of liability and damage issues "must be grounded upon a clear understanding between court and counsel of the issue or issues involved in each phase and what proof will be required to pass from one phase to the next." *Response of Carolina, Inc.* v. *Leasco Response, Inc.,* 537 F.2d 1307, 1324 (5th Cir. 1976); *see also Warner* v. *Rossignol,* 513 F.2d 678, 684 (1st Cir. 1975); *Moss* v. *Associated Transport, Inc.,* 344 F.2d 23, 26 (6th Cir. 1965); *United States* v. *International Business Machines Corp.,* 60 F.R.D. 654, 657 (S.D.N.Y. 1973); *Martin* v. *Bell Helicopter Co.,* 85 F.R.D. 654, 658 (D. Colo. 1980).

The Fifth Circuit sought to reconcile these settled principles with the trial court's actions in this case by suggesting that the pre-trial order of March 27, 1978 should have put petitioners on notice that measure of damages was at issue in the first trial. (655 F.2d at 635-36, Pet. J.A. A-11) That order severed "for subsequent trial as appropriate . . . the amount of damages sustained by individual plaintiffs, intervenors and class members." (J.A. p. 127) Even read in isolation, this order is fully consistent with petitioners' understanding that the measure of damages, which is an integral part of calculating individual damages, had been severed for later trial.

Importantly, however, the order did not stand in isolation. It was part of a series of events, ignored by the Fifth Circuit, that reinforced petitioners' belief regarding the severance of the measure of damages issue. Early in the proceeding, the district judge who was originally assigned to the cases stated that he would "split the liability and damage phases of these proceedings." (Supp. Vol. 16, Tr. 14162-95) Under estab-

lished precedent in the Fifth Circuit, as elsewhere, measure of damages was to be treated as part of "damages," as distinguished from the "liability" issues of statutory violation and impact. *Alabama* v. *Blue Bird Body Co.*, 573 F.2d 309, 317 (5th Cir. 1978); *Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d 16, 20, 22-23 (5th Cir.), *cert. dismissed*, 419 U.S. 987 (1974).[37]

This traditional approach to bifurcation was reconfirmed in the trial court's introductory remarks to prospective jurors —after the March 27 pre-trial order. While explaining that the first jury would be determining "whether or not these three defendant companies did violate the antitrust law in the way the plaintiffs claim, and if so, whether that caused impact or damage" to purchasers, he emphasized that "*[t]he jury will not be determining the amount, the dollar amount of any such overcharge.*" (Tr. 5-6, J.A. p. 131; emphasis added)

The genuineness and reasonableness of petitioners' understanding that measure of damages was severed from the first trial is further buttressed by the fact that *both* sides tried the case as if measure of damages was not in issue. Thus, neither petitioners *nor respondents* referred to any expected evidence on measure of damages in their opening statements. Neither petitioners *nor respondents* asked their economic experts to testify in support of a particular measure of damages.[38] Neither petitioners *nor respondents* cross-examined the other's

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[37] The Fifth Circuit had previously observed that the liability issue of "impact" is synonymous with "fact of damage." *Blue Bird*, 573 F.2d at 317 n.18. In an unprecedented step, however, the Court declared in this case that impact will henceforth be broadened to subsume not only fact of damage, but also measure of damages. (655 F.2d at 634-35, Pet. J.A. at A-9)

[38] The Fifth Circuit stated that respondents' expert "testified that if competition had been at work in the plywood industry during the damage period, it would have eliminated the ability of [petitioners] to realize additional revenue in the amount of the phantom freight charged on the sale of southern plywood." (655 F.2d at 635, Pet. J.A. at A-11) The witness' brief remark on this

expert on measure of damages. And, most tellingly, while both parties submitted proposed jury instructions on the liability issues of statutory violation and fact of damage, neither petitioners *nor respondents* submitted any instructions on measure of damages.

The Fifth Circuit also overlooked the district judge's own post-trial concession that, while he thought he was drawing a distinction between the terms "amount of damages sustained by individual plaintiffs" (used in the March 27, 1978 pre-trial order) and "measure of damages,"

> "It may very well be and the Court has no reason to doubt [the] sincerity of defense counsel in equating those two terms." (J.A. p. 327)

Particularly in light of all that preceded it, this concession by the trial judge is dispositive. The due process requirement of notice and opportunity to be heard is concerned with what the *parties*, not the court, reasonably understood the order to mean. *See Chemical Cleaning, Inc.* v. *Dow Chemical Co.*, 379 F.2d 294, 297 (5th Cir. 1967), *cert. denied*, 389 U.S. 1040 (1968) (damage award cannot stand where defense counsel "was inadvertently lulled into the belief that the issue of damages would be left to be considered separately"); *Dillon* v. *Bay City Constr. Co.*, 512 F.2d 801, 804 (5th Cir. 1975) (even where "the Judge did give prior notice of the consolidation" of the preliminary injunction hearing and the trial on the merits, the "confusion [of counsel] resulted in an inadequate hearing because counsel . . . failed to put on even the evidence then available on the merits").

So here, petitioners did not introduce the substantial evidence on measure of damages which they already had available—both through discovery and the lengthy FTC proceedings—because of their justifiable understanding of the bifurcation. In circumstances far less compelling, the Second Circuit held that an appellant was denied due process

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topic, however, was clearly made in the context of the liability issue of impact on respondents. (Tr. 2369, J.A. p. 325)

since "he was not given the opportunity to introduce expert witnesses, and he may not have fully cross-examined [other witnesses] as to the issue." *Knapp* v. *McFarland,* 457 F.2d 881, 887 (2d Cir.), *cert. denied,* 409 U.S. 850 (1972).

As a final rationale for denying petitioners their right to present evidence on the measure of damages, the Fifth Circuit also suggested that petitioners would thereby have gained some unfair stategic advantage: "Having failed to persuade the first jury that their challenged practices caused damage to no one, defendants now seek the opportunity to convince a different jury that some other measure of damages is appropriate." (655 F.2d at 636, Pet. J.A. at A-11)

There is nothing unusual or improper, however, in defendants' seeking to demonstrate at the liability stage that there was no impact on plaintiffs because the challenged practice had no effect on prices (*i.e.,* zero damage), and later urging the jury trying damages to consider a measure that would result in some damages, though less than those sought by plaintiffs. To the contrary, this is regularly done where liability and damages are severed. For example, it is hard to imagine that, if the jury had found for respondents on fact of damage but rejected the trial court's suggested measure of damages, *respondents* would have been precluded (as *petitioners* have been) from urging a different measure at the subsequent damages trial.

B. The court's leading interrogatories precluded fair consideration by the jury of the measure of damages.

The denial of petitioners' due process rights that resulted from submitting the measure of damages to the first jury was compounded by the leading form in which the issue was put. The trial judge *sua sponte* drafted special interrogatories that left the jury no real choice but to accept the measure sug-

gested by the court if it found for respondents on the conspiracy issues. The interrogatories asked:

> "2. (a) Did the use of 'West Coast freight' in the pricing of Southern pine plywood during the period from February 23, 1968, to December 31, 1973, cause financial damage to the purchasers of such plywood?
>
> (b) If 2(a) is answered 'yes,' was that damage equal to the amount by which 'West Coast freight' exceeded the actual freight charge (or the pick-up allowance)?" (Pet. J.A. at I-2)[39]

Once the jury answered Interrogatory 2(a) affirmatively, it would be naive to believe that its answer to 2(b) could be other than "yes." No alternative measure of damages was suggested. Nor was the jury even given the opportunity to indicate whether they believed some other measure would be proper. They were also given no guidance in the instructions as to what they should consider in setting a proper measure. The parties (believing that the issue had been severed) submitted no proposed instructions on measure of damages, and the trial judge drafted none of his own.

In short, because of the leading nature of the interrogatories, the jurors were presented with an all-or-nothing proposition, and their adoption of the only measure suggested by the court was inevitable. As a consequence, the jury was effectively foreclosed from considering the measure of damages that petitioners have urged and the law mandates—the difference between the total price of plywood as affected by the alleged conspiracy and the total price of plywood as it would have existed absent the alleged conspiracy.

The final irony is that the measure of damages that the jury was led to adopt by the trial court's *sua sponte* interrogatories was one that respondents had earlier disavowed

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[39] Parallel questions were posed concerning the use of standard weights when quoting prices on western fir plywood. (Pet. J.A. at I-3)

because it would have barred class certification. During the class certification hearings, petitioners argued that class treatment was improper if so-called "phantom freight" (the freight differential) were the measure of damages due to the conflicting interests it would create among the plaintiff purchasers. To meet this contention, respondents' counsel of record quoted from *Albertson's, Inc.* v. *Amalgamated Sugar Co.*, 62 F.R.D. 52 (D. Utah 1973), *aff'd in pertinent part*, 503 F.2d 459 (10th Cir. 1974), to the effect that the "argument is without merit since the damages will not equal the phantom freight paid . . . ." (2d Supp. Vol. 1, hearing of May 22, 1975, p. 258) Yet "phantom freight" is precisely the measure of damages adopted by the jury on the basis of the trial court's interrogatories.

The trial court has considerable discretion concerning the nature and scope of the issues to be submitted to the jury under Rule 49(a), but only "so long as they present the case fairly." C. Wright & A. Miller, *Federal Practice & Procedure* § 2506, at 498-99 (1971). Here, the special verdict form presented the damage issue in a one-sided and prejudicial manner. Especially in light of the economically irrational measure of damages that the interrogatories led the jury to adopt, reversal is mandated because petitioners were never given the opportunity fairly to present their evidence and theories on this crucial issue.

CONCLUSION

For the foregoing reasons, petitioners submit that the judgments below should be reversed. Under proper legal standards, there is no basis on which a reasonable jury could find that petitioners conspired to use West Coast freight and standard weights when quoting plywood prices, or that the method of quoting prices had any effect on the prices themselves, let alone the effect found by the jury. At a minimum, petitioners are entitled to a new trial so that the legality and effect of their conduct can be assessed under the correct

conspiracy and damage standards and in a proceeding compatible with due process.

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Nos. 81-1618 and 81-1619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WEYERHAEUSER COMPANY and
WILLAMETTE INDUSTRIES, INC.,
Petitioners,

v.

LYMAN LAMB COMPANY, *et al.*,
Respondents.

GEORGIA-PACIFIC CORPORATION,
Petitioner,

v.

LYMAN LAMB COMPANY, *et al.*,
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On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

Did the District Court and the Court of Appeals err in refusing to overturn the jury's verdict that defendants and other plywood manufacturers illegally conspired to fix the price of plywood through the use of phantom "west coast freight" and "association weights," where that verdict was supported by substantial direct, circumstantial and expert evidence of conspiracy, coupled with evidence that the manufacturers' uniform adherence to this arbitrary pricing system would have made no economic sense absent a conspiracy?

Did the District Court and the Court of Appeals err in refusing to overturn the jury's verdict that the plaintiff class suffered damages in the amount of the phantom freight and weight charges, where such damages were supported by substantial direct, circumstantial and expert evidence—including evidence relied upon by the defendants themselves in their day-to-day businesses—and where defendants offered no evidence to rebut plaintiffs' showing, even though all parties were advised both prior to and during the trial that the measure of damages issue would be submitted to the jury?

PARTIES TO THE PROCEEDINGS

Plaintiffs below and respondents in this Court are Lyman Lamb Company, Plywoods Distributing Company, Baton Rouge Lumber Company, and the City of Arkadelphia, Arkansas, which purchased softwood plywood directly from the manufacturers during the period from February 23, 1968, through December 31, 1973. The remaining plaintiffs in the cases consolidated for trial consist of persons or entities who also purchased softwood plywood directly from the manufacturers during the same period.

Defendants below and petitioners in this Court, and their subsidiaries and affiliates, are listed in their Briefs on the Merits.

Compliance with this Court's Rules 21 and 28 in class actions is ordinarily accomplished by listing only the named representative parties. However, we understand that the underlying purpose of the Rules is to give guidance to Members of the Court in regard to possible recusal.

It is not feasible for respondents to file with the Court the requisite copies of the lists of plaintiff class members, in view of the large number of names on those lists, the fact that these names appear on computer print-outs, and the physical size of the print-outs. Therefore, respondents are filing concurrently herewith a Motion for Relief from Compliance with Certain Provisions of Supreme Court Rules 28.1, 28.3, 33, 34.1(b), 35 and 39 so that respondents may obtain leave to lodge with the Clerk of the Court only one copy of their lists of plaintiff class members.

The amount of damages to be recovered thus far computed from defendants' own records for each class member is not a part of the record now on file with the Court.

However, such amounts are readily determinable from pleadings previously filed with the District Court. Therefore, should any Member of the Court wish to determine his or her holdings in one or more members of the class, as well as the amount of damages thus far computed for such class members, the Clerk need only notify respondents, and their counsel will submit the requisite information, with copies to opposing counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Nos. 81-1618 and 81-1619

WEYERHAEUSER COMPANY and
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Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, *In re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981), appears as Appendix A in the Joint Appendix to both Petitions for Writs of Cer-

tiorari to the United States Court of Appeals for the Fifth Circuit ("APP").[1] The Fifth Circuit's November 3, 1981 order denying the defendants' Petition for Rehearing and Suggestion for Rehearing *En Banc* appears at APP G.

The opinion of the District Court denying the motion for judgment notwithstanding the verdict and for a new trial is unofficially reported at 1979-1 Trade Cas. (CCH) ¶ 62,459, and appears at APP C. The opinion of the District Court granting class certification is reported at 76 F.R.D. 570 and appears at APP D. The opinion of the Judicial Panel on Multidistrict Litigation consolidating the actions under 28 U.S.C. § 1407 is reported at 376 F. Supp. 1405 and appears at APP E.

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides, in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides, in relevant part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws * * * shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

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[1] We use the following abbreviations to refer to the record in this case: "APP" (Joint Appendix to Petitions for Writ of Certiorari); "JA" (Joint Appendix filed in conjunction with briefs on the merits); "TR" (trial transcript); "Vol." (volume of the Record on Appeal); "PX" (plaintiffs' trial exhibit); and "DX" (defendants' trial exhibit).

STATEMENT OF THE CASE

Defendants[2] seek to overturn a jury verdict that was upheld by the trial judge and unanimously affirmed by the Court of Appeals for the Fifth Circuit. Not only did both courts below affirm the jury's verdict, but not one member of the Fifth Circuit panel requested that the court be polled on rehearing *en banc*. Hence, the request for rehearing *en banc* was denied. APP G. The questions defendants raise are essentially questions of fact. No novel or substantial issue of law is presented.

Plaintiffs commenced this litigation in the Eastern District of Louisiana in 1972.[3] After initial assignments, the case was assigned to the Hon. Sam C. Pointer, Jr. and tried before a jury on all class issues: whether defendants conspired to fix prices, whether their conspiracy had a financial impact on plaintiffs, and the measure of damages to the class as a whole. JA 235-38.[4]

After a month-long trial and development of a record that includes 26 volumes of trial transcripts and 647 trial exhibits, the jury found that defendant plywood manufacturers fixed prices by conspiracy. Specifically, it found: (1) that the southern manufacturers conspiratorially charged their customers for a fictitious freight cost (sometimes referred to as "phantom freight," "freight pickup" or "freight gain") from Portland, Oregon, when in fact the plywood was shipped from mills in the South

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[2] Defendants are manufacturers of plywood. They are petitioners in this Court. Plaintiffs are direct purchasers of plywood. They are respondents in this Court.

[3] Gabriel Bldg. Supply Co. v. Agnew Plywood, C.A. 72-522 (JA 3). Similar actions, filed in various district courts, were consolidated in the Eastern District of Louisiana by the Judicial Panel on Multidistrict Litigation. APP E. Most manufacturers settled before trial.

[4] Judge Pointer severed for a later trial all individual issues, including the computation of the dollar amount of damages suffered by individual plaintiffs and class members. Pre-Trial Order No. 9 (JA 125-28). *See* Section III *infra*.

and the freight the manufacturers paid was substantially less than the freight for which they billed; and (2) that the western manufacturers conspiratorially charged their customers freight based on "association weights," which were almost always heavier than the actual weight of the plywood shipped. The difference between the association weights and the actual weights was sometimes referred to as "underweights" or "phantom weights." Defendants pocketed both the freight gain and the underweights. The jury found that during the damage period, from February 23, 1968 (the first date allowed by the statute of limitations) to December 31, 1973, plaintiffs were financially injured to the extent of these overcharges for freight and weight. APP I.

In the face of plaintiffs' overwhelming evidence of conspiracy and of the measure of damages to the class, defendants failed: to call as a trial witness any officer or employee of any defendant to explain defendants' extraordinary practice of charging their customers for nonexistent freight and weight; to explain the large number of damaging records taken from their own files; or to rebut plaintiffs' proof on the measure of damages to the class. Rather, defendants adopted a trial strategy of denial and avoidance. The jury found against defendants on all issues.

After the jury rendered its verdict for plaintiffs, defendants moved for judgment notwithstanding the verdict and for a new trial. The trial court denied both motions. APP C. Thereafter, four members of the plaintiff class moved for summary judgment as to the dollar amount of their individual damages computed in accordance with the jury's verdict. The trial court granted the motions and entered judgments for these plaintiffs. APP B.[5]

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[5] The calculation of the dollar amount of individual damages is still under way in the District Court. The defendants grossly overstate the probable amount of damages. While total damages are

[Footnote continued]

Defendants appealed to the Court of Appeals for the Fifth Circuit on grounds of claimed insufficiency both of the trial court's charge to the jury and of evidence to support the verdict. A unanimous Court of Appeals, like the trial court, rejected every one of defendants' legal and factual arguments. APP A.

SUMMARY OF ARGUMENT

This is a straightforward horizontal price fixing case. The evidence was unusually specific, and was clearly sufficient to support the jury's verdict.

The evidence of conspiracy was overwhelming. While defendants try to convert this case into one involving mere parallel action, that characterization is false. Plaintiffs introduced into evidence numerous damaging documents from defendants' own files. The record contains direct evidence of the plywood manufacturers' conspiracy to raise prices, as well as extensive evidence of communications regarding the subject of the conspiracy and adherence to a pricing system that would have been contrary to the manufacturers' economic self interest if each had acted alone. In the face of this evidence, defendants failed to call any officer or employee to refute or explain their actions.

The trial court correctly instructed the jury on conspiracy. Contrary to defendants' contention, the court warned the jurors repeatedly that they could not return a verdict for plaintiffs on the basis of mere parallel conduct and opportunity to conspire. Many times, the court instructed the jury that defendants and their coconspirators did not violate the law unless they used west coast freight and association weights by "contract, combination or conspiracy;" and many more times the court

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[5] [Continued]

expected to be substantial, the size of the recovery reflects the large number and size of sales and the many thousands of purchasers who were the victims of the conspiracy.

told the jury that they could not find a conspiracy unless they first found an *agreement.*

Similarly, the jury's verdict on the measure of class damages should not be overturned. The plaintiffs made their *prima facie* case on measure of damages when they proved: (1) that defendants agreed to charge their customers for the amounts of fictitious freight and weight; (2) that defendants systematically did charge plaintiffs those amounts for fictitious freight and weight; and (3) that defendants regularly computed, treated, and reported these charges as additional profits. Even if plaintiffs had the burden to prove more directly the effect of defendants' practices on delivered price, plaintiffs introduced substantial evidence, including expert testimony, that defendants' conspiratorial acts raised the price of plywood by the amount of the false charges. Defendants elected not to come forward with any evidence on measure of damages. They chose, instead, to cling to their contention that they never conspired.

While plaintiffs introduced direct and positive proof of the measure of their damages, defendants urge that plaintiffs were also required to prove by hypothetical evidence what the price of plywood would have been in the absence of the conspiracy. Such proof is not required when there is substantial evidence of a price fixing conspiracy and of the amount that the conspirators agreed upon. Moreover, requiring a jury to construct a hypothetical "but-for" price in view of the evidence here would militate against this Court's efforts to increase the efficiency with which complex litigation is administered.

The trial court's charge and special interrogatories to the jury on the measure of damages to the class were meticulously tailored to the facts of the case and the contentions of the parties. They were clearly proper. The court gave the jury the only charge that was supported by the record; namely, "whether the Plaintiffs are correct in their contention that the amount of damage that was sustained by purchasers was equal to" the charges for the

nonexistent freight and weight. JA 195. If not, the jury was instructed to find for defendants.

Defendants knew before the trial began and were reminded during the trial that the measure of damages to the class as a whole was an issue to be tried in the first trial along with all of the other class issues. Their belated contention that they misunderstood the trial court's order is merely a pretense to extricate themselves from the consequences of their own trial strategy.

ARGUMENT

I. THIS COURT SHOULD NOT UPSET THE JURY'S VERDICT ON CONSPIRACY

A. Introduction

This is a plain horizontal price fixing conspiracy case. The issue before the Court is a straightforward factual one: whether sufficient evidence supported the jury's verdict that defendants and other plywood manufacturers conspired to fix the price of plywood through the use of "west coast freight" and "association weights." Further factual review by this Court is therefore inappropriate under the "two-court rule." [6]

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[6] *See* Branti v. Finkel, 445 U.S. 507, 512 n.6 (1980) (absent "most exceptional circumstances," Court will not review factual determinations in which District Court and Court of Appeals have concurred); Berenyi v. District Director, 385 U.S. 630, 635 (1967) (same). Determination of the existence of a conspiracy involves questions of fact to be decided by the jury. McElhenney Co. v. Western Auto Supply Co., 269 F.2d 332, 337 (4th Cir. 1959); Gary Theatre Co. v. Columbia Pictures Corp., 120 F.2d 891, 894 (7th Cir. 1941). There exist no "exceptional circumstances" justifying a departure from the rule in this case. As the Court stated earlier this year in Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 102 S.Ct. 2182, 2190 (1982):

> An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court "might give the facts another construction [or] resolve the ambiguities differently * * *." United States v. Real Estate Boards, 339 U.S. 485, 495 (1950).

In an effort to avoid the verdict against them, defendants seek to erect a straw man—an issue as fictitious as the phantom freight and weight they charged their customers. Defendants ask this Court to find that the jury's verdict was based solely on evidence of "parallel action" or, at most, on evidence of "parallel action" plus "opportunity contacts." *See* Brief on the Merits of Petitioner Georgia-Pacific Corporation ("G-P Brief") at 40-41; Brief of Petitioners Weyerhaeuser Company and Willamette Industries, Inc. ("Wey. Brief") at 31. Having thus inaccurately framed the issue, defendants invoke case authorities holding that parallel action or opportunity evidence —without more—will not support a finding of conspiracy.

This is not a case of mere "parallel action." A case in which one "competitor" writes to another that "[o]ne of our principal objectives * * * is to do everything possible to stabilize prices" (PX 377 (JA 422, TR 2252, 2298)) can hardly be so characterized. The case was not tried on a parallel action theory, and neither the evidence nor the instructions proceeded on such a theory. The parallel conduct that was shown here was merely cumulative and supplemented the other direct and circumstantial evidence of conspiracy submitted for the jury's consideration. It showed that all the conspirators did, in fact, adhere to the agreement which other evidence proved they had made.

Unlike the ordinary conspiracy case, in which a jury must infer concerted action from isolated and often weak bits of circumstantial evidence, the plaintiffs here presented direct proof of agreement seldom obtainable in a case of this kind. Testimonial and documentary evidence established the existence of an agreement among plywood manufacturers to fix the delivered price of plywood. The record shows that these "competitors" discussed prices and pricing policy, that they exchanged intimate information on each other's pricing and marketing strategies, that

they carefully monitored adherence to the system of west coast freight and association weights, and that they made attempts to detect "price cutters" and others who deviated from the practices at issue. Moreover, under the circumstances then existing in the plywood industry, the uniformity of conduct among manufacturers in adhering to this arbitrary and artificial pricing system would have made no economic sense absent an agreement. Nevertheless, in the face of this compelling evidence of collusion, the defendants did not produce, as a trial witness, a single officer or employee to offer any explanation for the manufacturers' actions. This significant silence is itself evidence of conspiracy.

In denying defendants' motion for judgment notwithstanding the verdict, Judge Pointer stated:

> The defendants vigorously challenge the sufficiency of the evidence with respect to the findings of a conspiracy. The court disagrees, believing the evidence sufficient not merely to create a jury issue but also to cause it, like the jury, to find that there was a conspiracy and that the three defendants were parties to that conspiracy. [APP C-3; footnote omitted.]

The Court of Appeals agreed, unanimously ruling that there was "substantial evidence * * * from which a reasonable jury, both directly and circumstantially, could find the existence of a conspiracy to fix prices." APP A-6. The "substantial evidence" to which the Court of Appeals referred not only supported the jury's findings in this case—it compelled it.

Defendants also claim that the Ninth Circuit's opinion in *Boise Cascade Corp.* v. *FTC*, 637 F.2d 573 (9th Cir. 1980) (APP J), rebuts plaintiffs' case. This claim too is groundless. The opinion of a different court, applying a different statute to different evidence, cannot be used to

nullify the jury's verdict in this case and to deprive plaintiffs of their Seventh Amendment rights.[7]

Having failed to rebut the substantial evidence against them, defendants now assert that the trial court's instructions were inadequate to inform the jury as to the standards to be applied in weighing this evidence. This argument, too, is without merit and was unanimously rejected by the Court of Appeals. Not only were the jurors informed of the necessity to find a "contract, combination or conspiracy," but the District Court emphasized time and again the need to find an actual agreement, thus dispelling all doubt as to whether the jury found such an agreement in this case. Because the evidence was more

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[7] The court's conclusions in *Boise Cascade* have no implications for this case. In *Boise Cascade*, the FTC tried unsuccessfully to establish a new principle of law that parallel use of an artificial freight factor is *per se* an unfair method of competition under Section 5 of the Federal Trade Commission Act. (A unilateral act may violate the Federal Trade Commission Act; no contract, combination or conspiracy is necessary.) Thus, the FTC tried its case without proof of conspiracy and without economic evidence of the effect of the phantom charges on total price.

To the contrary, plaintiffs here presented abundant evidence of conspiracy and the testimony of an expert economic witness, who demonstrated the effect of defendants' conspiratorial practices on price. (The Ninth Circuit found the failure of the FTC to present expert evidence fatal to its case. 637 F.2d at 580.) Additionally, in this case plaintiffs introduced deposition testimony of 21 witnesses and critical documents that were not introduced in the FTC case. For example, James Tweedie of Weyerhaeuser did not testify in the FTC case (*see* pp. 13-15 *infra*) and exhibits PX 393 (JA 424, TR 2289), PX 410 (JA 425, TR 1956), PX 420 (JA 438, TR 1327), PX 421 (JA 439, TR 1327) and PX 539 (JA 440, TR 2219) were not introduced in the FTC proceeding.

The Brief for the United States as Amicus Curiae ("U.S. Amicus Brief") correctly concludes: "The two decisions [the Fifth and Ninth Circuit decisions] thus focused on different legal issues arising in different evidentiary settings; they do not reflect disagreement as to relevant legal standards." U.S. Amicus Brief at 21-22 n.21.

than sufficient to support this finding, both with respect to the defendants and the settled co-conspirators, the jury's verdict should not be overturned by this Court.[8]

B. The Jury's Verdict Was Amply Supported by Strong Direct, Circumstantial and Expert Evidence of Conspiracy

Conspirators ordinarily leave little, if any, documentary record of their concerted actions, and proof of concert must be based solely on traces of circumstantial evidence. *See Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600, 612 (1914). As the Fifth Circuit recognized, that is far from the case here:

> It does not strain credulity that solemnized covenants to conspire are difficult to come by in any price fixing case. Plaintiffs have, nevertheless, unearthed damaging evidence from the mouths, or typewriters, of defendants' own employees. [APP A-6.]

Indeed, as discussed below, the defendants' contemporaneous business documents and related deposition testimony provided unrefuted evidence that the plywood manufacturers conspired to fix prices.

1. *The evidence shows that the plywood manufacturers conspired to fix prices and took actions to enforce the conspiracy*

Plaintiffs introduced an overwhelming amount of evidence of conspiracy, including evidence that the defendants conspired to raise and stabilize prices; that they directly communicated with each other regarding the subject of the conspiracy; that the larger manufacturers contracted to purchase plywood from new entrants into the South to guarantee that all producers would use the west coast freight pricing formula; and that the manufacturers carefully monitored adherence to the pricing system.

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[8] The United States, in its amicus brief, agrees that the jury's verdict was supported by substantial evidence of conspiracy, and that the District Court's charge to the jury was legally sufficient. *See* U.S. Amicus Brief at 5-22.

A letter from L. B. Olmsted, Vice President of U.S. Plywood (Champion International), a major manufacturer, to Kirby Herndon, President of Kirby Lumber, eloquently illustrates both the existence of the conspiracy and means by which it was implemented. At that time, Kirby was a new entrant into the southern plywood market, with no west coast production. Noting that he was "anxious to develop a much closer working relationship with you than we presently enjoy," Olmsted renewed an earlier proposal to buy up to 40% of Kirby's total production "under contract or commitment."[9] In describing his offer, Olmsted said:

> One of our principal objectives in trying to line up outside production is to do everything possible to stabilize prices, especially in those markets close to the plant. We would guarantee you too, as I said, an average freight pickup of at least 70¢. [PX 377 (JA 422, TR 2252, 2298).[10]]

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[9] The U.S. Plywood-Kirby relationship continued through at least 1973. Throughout that period the freight pickup continued to increase from 70¢ to a minimum of $1.15 per hundredweight. PX 315 (TR 1826, 1828). Moreover, a substantial portion of Kirby's production was sold to various major manufacturers pursuant to the same "system." *See, e.g.*, PX 18 (TR 576) (Kirby - Georgia-Pacific), PX 387 (TR 2689), PX 414 (TR 2689) (Kirby - U.S. Plywood). Kirby adopted and rigidly adhered to this pricing system; indeed, the Kirby price lists specified the applicable west coast freight rate. PX 394 (TR 2488), PX 395 (TR 2689). *See also* PX 415 (TR 2689).

Another typical example of a contract providing for a specified "minimum" freight gain is PX 186 (TR 447, 701) (Arkla-Weyerhaeuser).

[10] This letter, without more, is strong evidence of a *per se* violation of the antitrust laws. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940):

> *Any combination which tampers with price structures is engaged in an unlawful activity.* Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, *or stabilized prices* they would be directly interfering with the free play of market forces. The [Sherman] Act places all such schemes beyond the

[Footnote continued]

Thus, to indoctrinate the new entrant into price stabilization, the established producer guaranteed it a minimum average "freight pickup."

James Tweedie, Weyerhaeuser's Softwood Plywood Product Manager, was, as the Fifth Circuit indicated (APP A-6, 7, 8), one of the principal actors in the conspiracy. Tweedie and other Weyerhaeuser employees were in frequent communication with other plywood manufacturers regarding pricing policy and other competitively significant subjects.[11] Plaintiffs' Exhibit 182 (JA 405, TR 372, 2662) describes a meeting between Tweedie and representatives of Georgia-Pacific (which, with Weyerhaeuser, accounted for more than 50 percent of the total southern market) in which the "subjects discussed" included pricing, order placement, and sales practices. The final paragraph of the exhibit describes the meeting as follows:

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[10] [Continued]

pale and protects that vital part of our economy *against any degree of interference.* [Emphasis added.]

The trial record is replete with evidence that the large manufacturers with plants in both the West and the South bought substantial portions of the production of new entrants into the South. *E.g.*, PX 19 (TR 590) (Owens-Illinois - Georgia-Pacific); PX 239 (TR 2689) (Arkla-Weyerhaeuser); PX 308 (TR 1812) (Temple-U.S. Plywood); PX 309 (TR 1813), PX 319 (TR 1848), PX 506 (TR 1244) (Owens-Illinois - U.S. Plywood); TR 1810-17 (Sumter-U.S. Plywood).

[11] Tweedie and other Weyerhaeuser employees engaged in ongoing and direct communications with competitors regarding such subjects as price; the west coast freight pricing system for southern plywood; stockpiling of plywood; transfer pricing; contract sales prices; outside plywood purchases; production capacity; and maximizing freight return. PX 180 (JA 401, TR 364, 2662), PX 182 (JA 405, TR 372, 2662), PX 183 (TR 434, 2662), PX 189 (TR 1495, 1772), PX 192 (TR 1495, 1500), PX 193 (TR 1495, 1500). These include communications with one or more of the following co-conspirators: Georgia-Pacific, Willamette, Arkla, Boise Cascade, Dixon, International Paper, Kirby, Louisiana-Pacific, MacMillan-Bloedel, Medford, Owens-Illinois, Scotch, Temple, Tremont, Union Camp, and Vancouver. *See* note 36 *infra*.

> It was a good exchange and the connection has been made to keep in touch without exposing our individual companies to any risks. [PX 182.]

Another Weyerhaeuser employee described his establishment of "communication channels" with Georgia-Pacific, offering "an opportunity to secure specific competitive information. * * * [I]t is my intention to keep this direct contact open through weekly phone conversations." PX 180 (JA 401, TR 364, 2662).

Defendants' present characterization of the communications reflected in these and similar documents as "normal" (G-P Brief at 44-45; Wey. Brief at 39 n.22) is typical of their approach to the evidence in this case. If such conduct were "normal," there would be no need for concern over "risk." The jury could legitimately infer that the risk to which Tweedie referred in PX 182 was the risk of being caught participating in an illegal price fixing conspiracy.

Tweedie and the Georgia-Pacific representatives specifically conferred on the subject of the conspiracy. In addition to describing their discussion of pricing policy,[12] Tweedie noted that they also discussed selling southern plywood in New England, and that he was told that Georgia-Pacific "receive[s] pressure to ship into that area, but due to freight return resist[s] all possible." Thus, PX 182 shows that these "competitors" discussed not only the west coast freight pricing system, but also the geographical marketing restrictions by which they implemented that system.[13]

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[12] The memorandum reports that Georgia-Pacific was pricing "on lowest market level with Crows as basis for price." PX 182 (JA 405, TR 372, 2662). *Crow's* was a weekly market report of plywood prices to which west coast freight was added to reach a delivered price. *Random Lengths* was a similar publication. TR 177-78.

[13] Thus, PX 182 alone shows the error of defendants' disingenuous assertion (Wey. Brief at 39) that PX 174 (JA 398, TR 346-47) was the *only* document cited by the Court of Appeals which even mentioned "the subject of" west coast freight or association weights. *See also* PX 10 (JA 385, TR 773-74).

Weyerhaeuser employees sent Tweedie numerous reports on the pricing and production policies of other manufacturers, particularly Georgia-Pacific.[14] A regional sales manager testified that it was "generally understood" at Weyerhaeuser that Tweedie was the person to whom one would go regarding information concerning competitors. TR 847-48. Tweedie had *no legitimate purpose* for assembling this information because during most of this period, he had no responsibility for either the sale or the purchase of plywood. TR 307-12, 341, 451. His obtaining information from Georgia-Pacific is itself suspect, since Georgia-Pacific and Weyerhaeuser had no other plywood-related dealings with each other.[15]

It must be remembered that Tweedie was not part of a small, family-owned business. Weyerhaeuser is a huge, international company with a large staff of both inside and outside legal counsel. Weyerhaeuser's annual net sales in 1973 were over $2 billion, and its profits were over $300 million. Its in-house attorneys alone number 22 at latest report. Tweedie and his compatriots could not possibly have acted without sophisticated knowledge that

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[14] For example, Tweedie received a copy of PX 174 (JA 398, TR 346-47), a report on "Local Southern Pine Plywood production" in Columbia, South Carolina, which stated, "They [Georgia-Pacific] have adopted the following price basis. Low Crow's less 5% less 3% *plus West Coast freight*"; emphasis added. Similarly, Tweedie was sent a copy of PX 175 (JA 399, TR 348), which described another Weyerhaeuser employee's obtaining information on Georgia-Pacific's pricing for its "intermediate glue line." The author, K.C. Sissons, reported that an "old acquaintance" at Georgia-Pacific had informed him that this line was priced "$2.00 to $3.00 under their exterior level." A year later, Tweedie prepared a memorandum reporting specific information on Georgia-Pacific's expected production, which Sissons had also obtained directly from a Georgia-Pacific employee. PX 244 (TR 2689).

[15] James G. Harries, who had been in charge of outside purchasing for Georgia-Pacific, testified that between 1966 and 1973 Georgia-Pacific made no purchases of southern plywood from Weyerhaeuser. TR 573-74, 581-82. Thomas C. Nash, Georgia-Pacific's plywood sales manager, indicated that at most Georgia-Pacific had made one or two small purchases from Weyerhaeuser. TR 923-24.

what they were doing was illegal. The miracle is that plaintiffs were able to discover as much as they did about the defendants' practices, particularly in view of defendants' destruction and suppression of documents. APP A-16, 17; TR 2333-40.

The other plywood manufacturers also regularly shared specific information on price or pricing policy with one another. For example, a 1969 memorandum of Georgia-Pacific discussed a conversation with an Owens-Illinois sales manager regarding the latter's policy of withholding plywood from the market rather than allowing the price to fall:

> Enthusiastically, Joe explained his plywood storage program. Rather than sell ½" under $80, he has received permission from his management *to hold stock up to six months.* * * * Joe feels that he will receive significant business *at a minimum price of $80.00* on the basis of immediate loading. [PX 28 (TR 2190, 2297); emphasis added.]

Similarly, a 1971 internal memorandum from Georgia-Pacific's Vice President of Sales described his meeting with a Boise Cascade Sales Manager, at which they discussed the specific price Boise Cascade would charge for southern plywood. PX 29 (JA 388, TR 2193). In addition, Willamette's Vice-President for Sales and Marketing admitted that he "may have" discussed "association or estimated weights" and "underweights" with other manufacturers. TR 1720-21. The record abounds with other examples of direct communications between manufacturers on competitively sensitive issues, including price. *See, e.g.*, PX 28 (TR 2190, 2297), PX 29 (JA 388, TR 2193), PX 244 (TR 2689), PX 245 (TR 2689), PX 333 (TR 1860), PX 336 (TR 1860), PX 342 (TR 1860), PX 343 (TR 2112), PX 544 (TR 2689); JA 299-300; TR 545-46, 1905-08, 2168-72.

Plaintiffs also introduced abundant evidence that the manufacturers monitored their conspiracy. One interoffice Georgia-Pacific memorandum is particularly revealing

on this point. In September 1972, Larry B. Trammel, a regional sales manager, was apparently alarmed by a rumor that some mills were defecting from the system, and sent Georgia-Pacific's Winston Purifoy the following message:

> Tom Mateo advises he has heard of some Arkansas plywood mills shifting to an FOB mill pricing policy. Do you know anything about this?

Purifoy responded:

> Negative. I had not heard this and called all plants. Big W [Weyerhaeuser] is now encouraging their more distant truck customers to make mill pick-ups in return for an allowance. They thus are dropping their truck customers in poor freight gain areas. [PX 10 (JA 385, TR 773-74).[16]]

This memorandum shows not only that Georgia-Pacific was closely monitoring the pricing practices of its competitors, but also that Purifoy's immediate response to this inquiry was to call his competitors.[17] Trammel's

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[16] Purifoy's memorandum is revealing for still another reason. Since the "allowance" received by the customers picking up at the mill was an amount not greater than actual freight, this was further evidence that manufacturers retained the full amount of the "phantom freight" as profit. The following example illustrates this point. Assume that a customer in Town A wished to purchase plywood having an invoice value of $100 from a mill in Town B, and that the west coast freight from Portland to Town A was $20. Assume further that the actual cost of transporting the plywood from Town B to Town A was $4. If the customer bought the plywood on a delivered price basis, the manufacturer would receive $120—the $100 invoice value plus the $20 "freight" charge, of which $16 was the conspiratorial "phantom" freight profit. If, instead, the customer picked up the plywood at the mill, the allowance he received related to the *actual* cost of transporting the plywood ($4) rather than to the amount which the manufacturer characterized as "freight" charge ($20). Thus, the manufacturer pocketed the same full amount of the phantom freight, or $16, even though he had incurred no transportation costs whatsoever.

[17] Similarly, in 1971, when Georgia-Pacific was concerned about certain details of Weyerhaeuser's customer truck pickups at an Arkansas mill, its Vice President of Sales called Weyerhaeuser directly to "check it out." PX 11 (TR 782-83).

deposition testimony confirmed that the pricing policies about which Purifoy called his competitors related to charging west coast freight on southern plywood. TR 775-82. Such an attempt to verify a co-conspirator's deviation from the system by directly contacting that co-conspirator is a well-recognized method of policing a conspiracy. *See United States* v. *United States Gypsum Co.*, 438 U.S. 422, 458 (1978).

The U.S. Plywood-Kirby document (PX 377) (JA 422, TR 2252, 2298), part of which is quoted above, further shows the extent of defendants' monitoring activities. U.S. Plywood alerted new entrant Kirby to price cutting in markets where production was concentrated and offered to buy 40% of Kirby's production as part of a plan "to do everything possible to stabilize prices * * *."

Defendants' contention that these communications amounted to no more than "opportunity contacts" is specious. Evidence of this sort establishes far more than the "mere physical possibility of discussion" (G-P Brief at 41) or "ambiguous communication" (Wey. Brief at 40), as the very cases relied upon by defendants in support of their argument confirm. *See* G-P Brief at 41-42; Wey. Brief at 35-36.

2. The evidence shows that all plywood manufacturers knowingly adhered to a uniform, industry-wide pricing system

In addition to the evidence of conspiracy discussed above, unrefuted testimonial and documentary evidence amply supported the jury's finding that all southern plywood manufacturers utilized west coast freight in calculating delivered prices, and that all plywood manufacturers priced western fir plywood by utilizing association weights.[18] This was not evidence of mere "parallel

[18] Significantly, none of the defendants contended that west coast freight and association weights were not uniformly used by the

[Footnote continued]

action;" the plaintiffs' evidence established the existence of a uniformity of conduct among the plywood manufacturers which showed that the conspiracy was carried out and which would have made no economic sense absent an agreement. Thus, the jury's finding that such conduct in fact resulted from an agreement should not be disturbed.

West coast freight and southern plywood. Representatives of defendants and other manufacturers admitted in depositions or documents introduced by plaintiffs that they followed a standard pricing formula—they added west coast freight to a mill price, which was basically the west coast mill price. Mr. Day of Weyerhaeuser testified:

> Q. You quoted southern pine plywood on a delivered basis to the customer, which delivered price was arrived at by taking the mill FOB West Coast price and adding West Coast freight to the destination for the southern pine plywood. Isn't that correct?
>
> A. Well, that was the formula, the way of doing it, yes. [JA 296-97.]

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[18] [Continued]

other co-conspirators. Rather, in each instance counsel attempted to come forward with an excuse for the uniform industry practice.

For example, in his opening statement to the jury, counsel for Georgia-Pacific admitted that his company "kept track of" its freight advantage (TR 100), and contended that all his client did was to meet the Pacific Northwest price, which was what his client was competing against. TR 103. Counsel for Weyerhaeuser argued that west coast freight was used because "it was the same product," and "why shouldn't you get the same price or something close to it when you have made the investment to move your facilities all the way from the west coast to the southeastern part of the United States." TR 118. Finally, Willamette's attorney argued that "[w]e thought that we could sell it for about the same price because the customers who were going to buy our wood were going to be the same customers who had been buying the northwestern plywood." TR 129. Further, he said his company adhered to the challenged pricing practices so that customers could compare prices (TR 130-31) and because the customer in each case wanted a guaranteed price in advance of the sale. TR 135-36.

Mr. Davis of Willamette testified that his company also computed the delivered price of its southern plywood by adding west coast freight to the west coast base price:

> [W]e used in our sales system a west coast, west coast base price for southern pine, plus a west coast freight to arrive at a delivered price per quotation to our customer. [TR 1994.]

See also PX 739 (TR 2689).

The companies followed the formula for adding west coast freight to mill price knowing that their competitors were doing the same thing, and counting upon them to do so. TR 2141.[19] Thus, in a 1970 letter, D.W. Fridell of Weyerhaeuser explained:

> [I]t is hardly news that Southern Pine plywood cannot be picked up on a straight FOB mill base to save the West Coast applied freight. [PX 233 (JA 408, TR 1510).]

See also JA 270-72, 282, 295-97; TR 210-12, 233, 575, 1604, 1623-25.[20] That manufacturers considered this pric-

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[19] In addition to this unrefuted testimony that all southern producers followed this pricing method, there was evidence, also unrefuted, that the following specific companies, for example, added west coast freight to the mill price in billing for southern pine plywood: Georgia-Pacific (PX 501-D (TR 1202, 1205)); Weyerhaeuser (PX 194 (TR 1132); JA 295-97; TR 1093-1101); Willamette (PX 733 (TR 1986), PX 734 (TR 1999), PX 903 (JA 465, TR 1685)); Arkla (PX 239 (TR 2689); TR 1624-25); Boise Cascade (PX 274 (TR 1388, 1394); TR 2173); Champion (U.S. Plywood) (PX 296 (TR 1431), PX 348 (TR 1927); JA 270-72; TR 2173); Dixon (PX 623 (TR 2689)); International Paper (PX 525 (TR 2675, 2689)); Kirby (TR 759, 2480); Louisiana-Pacific (PX 296 (TR 1431); TR 1592-93); Louisiana Plywood (PX 240 (TR 2689), PX 735 (TR 2010)); Olinkraft (PX 161 (TR 467); TR 467-79); Owens-Illinois (PX 500 (TR 1182); TR 1183); Scotch (PX 424 (TR 1341); TR 1307, 1340); Temple (PX 539 (JA 440, TR 2219); TR 759); Union Camp (PX 530 (TR 2689)); and Vancouver (TR 1623-24).

[20] While one of these witnesses, James G. Harries of Georgia-Pacific, testified that MacMillan-Bloedel sold at variance with this formula (TR 575), William R. Coston, who worked for several manufacturers, testified that MacMillan-Bloedel was one of the first companies to price southern plywood by adding west coast freight. JA 282. The jury was justified in believing Coston.

ing practice to be industry-wide is further evidenced by the following handwritten notations on a letter agreement between U.S. Plywood and Kirby:

> [T]he method of determining delivered price, and [freight] pickup average of this agreement is subject to review *in the event of a change in industry practice.* [PX 315 (TR 1826, 1828); emphasis added.]

See also Section II.B.1 *infra.*

Association weights and western plywood. Similarly, the record contains unrefuted testimony that all manufacturers of western plywood used association weights. *E.g.*, PX 347 (JA 420, TR 1909, 2689), PX 837 (TR 2689); JA 247; TR 247-50, 797, 897, 1212, 1477, 1692-93, 1915, 2243-44.[21] For example, a Georgia-Pacific representative acknowledged that association weights were "used generally throughout the plywood industry." TR 247-49. Murl S. Wescott of Champion International stated categorically that association weights were used "[b]y everybody * * * [by] [m]ost all mills." TR 1915. Indeed, upon learning that two customers were withholding payment in the amount of the underweights, Wescott circulated a memorandum to all branch managers reminding them that "all quotations for softwood plywood, whether it be fir or pine, are based on the association or guaranteed weights," stating:

> I was quite surprised, *after all these years of this being a standard business practice in softwood ply-*

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[21] The record also shows specific examples of western manufacturers using association weights: *e.g.*, Georgia-Pacific (TR 1915); Weyerhaeuser (TR 826-30); Willamette (TR 1915); Bohemia (PX 450 (TR 2666)); Boise Cascade (TR 1365-66); Champion (TR 1915); Evans Products (PX 450 (TR 2666)); International Paper (PX 525 (TR 2675, 2689)); Louisiana-Pacific (TR 2564); Medford, Pacific Lumber, Plum Creek, Pope and Talbot, Potlatch, Rosboro, Simpson and St. Regis (PX 450 (TR 2666)).

> *wood*, to find some branches were apparently not aware of this situation and able to handle this problem on a branch level. [PX 347 (JA 420, TR 1909, 2689); emphasis added.]

It was well understood that *no* plywood manufacturer would make a refund to a customer who complained about underweights. Thus, the same memorandum went on to state:

> [H]e very likely will come to you and ask for a refund, which is not going to be given by *any mill*. [*Id.*; emphasis added.]

Similarly, a Georgia Pacific representative testified that the "agreed on weights" were "standard in the industry" and produced "an additional profit." JA 247. *See also* TR 1711. Acknowledging that the use of actual weights would have resulted in lower delivered prices, he went on to state, "everyone knows the freight factors involved, it just would not be allowed." TR 631.

3. *The pricing system used by the plywood manufacturers was arbitrary, artificial, and contrary to what competition would have produced*

Plaintiffs' economic expert, Richard J. Barber,[22] characterized the plywood manufacturers' use of west coast freight and association weights as "grossly, exceedingly arbitrary and artificial," and "not consistent with normal competitive behavior." JA 319-25. The jury was entitled to rely on Barber's expert opinion, particularly in view of the abundant evidence supporting his conclusions.

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[22] Barber, the president of a Washington, D.C., economic consulting firm, held advanced degrees in law and economics from the University of Michigan, Wayne State University and Yale University. He had extensive experience both in government and in the private sector, and also taught antitrust and business regulation, as well as related subjects, at three universities. TR 2344-51.

The most obviously "artificial" aspect of this pricing system was that the freight charges bore no relation to the actual cost of shipping plywood. Under the west coast freight system, freight charges increased as the distance from the west coast to the buyer increased, regardless of the location of the manufacturer and the distance between him and the buyer. Thus, both the price to the buyer and the revenue to the producer increased without regard to the actual costs involved. PX 415 (TR 2689); JA 283, 314; TR 233-34, 950-51. As even the most conservative commentators have recognized, such pricing practices are "plainly inconsistent with competition, which would quickly eliminate any phantom freight charges," and reflect collusion among manufacturers.[23]

Even the testimony of defendants' own expert, Professor Peter O. Steiner, supports the conclusion that west coast freight would not have been charged by southern manufacturers in a competitive market. In response to a question from Judge Pointer, Steiner conceded that if southern plywood continued to have price increments based solely on the west coast freight charge *after* there was an excess of supply over demand for plywood in the South, "I would say that is not a competitive market with a demand and supply result." JA 377. The evidence, in-

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[23] *E.g.*, R. Posner, *Antitrust Law: An Economic Perspective* 70-71 (1976). *See also* R. Posner & F. Easterbrook, *Antitrust* 346 (2d ed. 1981); F. Scherer, *Industrial Market Structure and Economic Performance* 329 (2d ed. 1980); *see* U.S. Amicus Brief at 18-19 and authorities there cited.

As recognized by the United States in its amicus brief, in some situations sellers have an incentive jointly to adopt such systems to restrain price cutting and divide up business more evenly despite regional fluctuations in demand. U.S. Amicus Brief at 18 n.16. As discussed elsewhere in this brief, the evidence supports a finding that the plywood manufacturers were motivated by a desire to restrain price cutters and that they implemented their price fixing conspiracy through a division of markets. *See* p. 18 *supra*, pp. 24-26 *infra*.

cluding Steiner's own testimony, shows that the supply of southern plywood exceeded demand in the South during the relevant period. PX 276 (TR 1400); DX 261 (JA 468, TR 2957); JA 352-53, 378; TR 2958-59, 3019, 3022, 3025-26.[24]

The market divisions that resulted from the manufacturers' agreement to use west coast freight were likewise contrary to what competition would have produced. Because the fictitious west coast freight charges increased as plywood moved farther east, if all manufacturers charged west coast freight and sold to the east, they would jointly maximize their profits. This conduct amounted to a division of markets in furtherance of the conspiracy: manufacturers gave up profit opportunities to the west in exchange for the assurance that they could extract full west coast freight, and greater profits, for sales to the east. *See* PX 744 (TR 2689), PX 903 (JA 465, TR 1685); TR 2064-65.

The division of markets is exemplified by two exhibits —PX 420 (JA 438, TR 1327) and PX 421 (JA 439, TR 1327)—which document the course of dealings (and refusal to deal) between Scotch Plywood, a conspiring manufacturer, and a class member, the Banks-McKinney Lumber Company. Banks-McKinney wrote to the Scotch mill in Fulton, Alabama, seeking to purchase plywood for lumber yards in Elkhart, Indiana, and Moultrie,

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[24] This testimony is fully corroborated by the defendants' own capacity and production statistics. For example, in 1966, Georgia-Pacific's "shipments of softwood plywood" from its southern mills (PX 600, schedule 12 (TR 799, 853)) represented 61% of its "plywood mill capacity" (*id.* schedule 6); that is, 39% of Georgia-Pacific's production capacity was unused. Georgia-Pacific's surplus capacity continued for the years 1967 (22% surplus), 1968 (17%), 1969 (21%), 1970 (22%) and 1971 (14%). *Id.* & schedule 9. Other southern producers were also producing at substantially less than capacity during the damage period. *See, e.g.*, PX 618, No. 35 (TR 2689) (Arkla); PX 620, Nos. 14, 5h and 35 (TR 2689) (Kirby); PX 624, Nos. 5, 35 (TR 2689) (Scotch).

Georgia. In both cases, Banks-McKinney indicated that it planned to pick up the plywood at the mill in its own truck. PX 420 (JA 438, TR 1327). In reply, Scotch stated that although the company "would be happy to serve you on your requirements at Moultrie,"

> [w]e are not attempting to distribute our Plywood in the Elkhart area, as we have an unfavorable freight situation on Plywood into that area from this point of origin. [PX 421 (JA 439, TR 1327).]

Scotch refused to make this sale based on the ultimate destination of the plywood, even though the customer would have picked up the plywood at Scotch's mill. In other words, Scotch would permit a purchaser to pick up at its mill only if the ultimate destination of that plywood was in an area having a favorable "freight situation," despite the fact that *Scotch would incur no freight costs whatsoever in making the sale.*[25] *See also* PX 10 (JA 385, TR 773, 774) (pp. 16-18 *supra*).

The other manufacturers, in order to generate freight pickup, also arbitrarily confined their sales to areas where the freight gain would be highest, generally to the east rather than to the west, regardless of the distances involved. PX 18 (TR 576), PX 734 (TR 1999); JA 283; TR 590-92, 616-17, 949-51. These restrictions coincided with the areas in which the manufacturers could "maximize" their freight advantage. *See* TR 514-15, 592, 1468.

Geographical limitations were specifically agreed to in numerous contracts between the conspiring manufacturers for the purchase of plywood. *See* PX 18 (TR 576), PX 19 (TR 590), PX 308-318 (TR 1812, 1813, 1816, 1817, 1823, 1826, 1836, 1843, 1847), PX 373 (TR

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[25] Significantly, after the termination of the conspiracy, Scotch became willing to sell to Elkhart, Indiana, because Elkhart was no longer in an unfavorable freight situation. TR 1329.

2689), PX 387 (TR 2689), PX 501-C (TR 1202, 1495), PX 551 (TR 2689), PX 748 (JA 460, TR 2046); TR 1821-22. Contracts limited marketing areas by guaranteeing a specific minimum "freight pickup," such as this 1971 agreement between Kirby and Georgia-Pacific.

> The limitation on possible destinations will be the stipulation that the difference between the West Coast rate of freight and the actual freight must be a minimum of $1.20 per [hundredweight]. [PX 18 (TR 576).]

Similarly, a 1972 agreement between Georgia-Pacific and Owens-Illinois stated, "All cars of plywood are to be shipped into Owens-Illinois marketing territory." PX 19 (TR 590). Georgia-Pacific's Harries testified that both agreements were intended "to maximize mill realization and freight gain." TR 591-92. *See also* PX 387 (TR 2689) (contract reflecting destinations which were "not acceptable" because of inadequate freight pickup).

There was other substantial record evidence from which the jury could have concluded that adherence to the challenged pricing system was contrary to each manufacturer's independent business interests, if that be required. As plaintiffs' expert witness testified, at times "the defendants and other companies, had to do things and did things that were not in their economic self interest in a competitive market." JA 319.[26] By adhering to the

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[26] As discussed in more detail below, defendants urge this Court to disregard the weight of the evidence and to adopt the legally incorrect standard that no finding of conspiracy may be based upon evidence of parallel action "unless the conduct is inconsistent with independent competitive behavior." Wey. Brief at 48. Defendants rely on Professor Turner's assertion that conscious parallelism does not evidence agreement absent "some other facts" indicating that the alleged conspirators' actions were "interdependent." Turner, *The Definition of Agreement under the Sherman Act: Conscious*

[Footnote continued]

system of equalizing delivered prices of southern and western plywood (*i.e.*, artificially raising the price of the southern plywood), manufacturers gave up their locational advantage with respect to southern purchasers.[27]

Moreover, the record reflects that in buying plywood from one another, manufacturers made no attempt to negotiate for actual freight charges rather than west coast freight, even though paying actual freight would have reduced their costs. To the contrary, they willingly paid phantom freight. PX 314 (TR 1823), PX 315 (TR 1826), PX 317 (TR 1843), PX 319 (TR 1848); TR 1810, 1823, 1846, 1859, 2119-23. By contrast, in a competitive market, buyers would be expected to negotiate vigorously to obtain the lowest possible price, particularly where, as here, the buyers had superior economic strength and bargaining power.

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[26] [Continued]

Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655, 658 (1962); Wey. Brief at 41-42.

Even assuming that such a standard were correct in a case like this one—which we dispute—the plaintiffs offered ample evidence to establish such "interdependence." A finding of conspiracy was thus appropriate even without the other direct and circumstantial evidence offered by the plaintiff. Moreover, defendants do not seriously contend that the plaintiffs failed to satisfy this "requirement." Instead, defendants Weyerhaeuser and Willamette devote nearly four pages of their brief to a reiteration of their own "evidence" to the effect that the pricing practices were *consistent* with independent competitive behavior. Wey. Brief at 44-48; *see* G-P Brief at 43-44. The jury was entitled to believe the plaintiffs.

[27] PX 227 (TR 2689), PX 233 (JA 408, TR 1510), PX 739 (TR 2689); JA 259-61, 296-97; TR 1994. *See also* PX 728 (TR 2710), PX 729 (TR 2710).

As the court noted in Fort Howard Paper Co. v. FTC, 156 F.2d 899 (7th Cir.), *cert. denied*, 329 U.S. 795 (1946):

> We are unable to comprehend a manufacturer's disdain of a natural advantage utilizing the same to gain local business, unless he were indoctrinated with the belief (or forced by superior economic competitors to align himself to concerted action of identical delivered prices) that elimination of all competition was economically preferable. [*Id.* at 906.]

The record further reflects that manufacturers turned away the opportunity to make sales by discouraging customers from picking up plywood at the mill. For example, Scotch Plywood's documented refusal to permit a customer to pick up plywood for delivery to Elkhart, Indiana, discussed above, provides evidence in support of Barber's expert conclusions. This refusal to sell to a ready and willing customer was not the act of a manufacturer in a competitive industry.

4. *Defendants' failure to refute or explain plaintiffs' evidence is itself persuasive evidence of conspiracy*

The defendants' failure to produce a *single witness* to provide some benign explanation for the extensive evidence of collusion—much less one with firsthand knowledge of the facts—was itself persuasive evidence of conspiracy. As this Court stated in *Interstate Circuit, Inc.* v. *United States*:

> This inference [of conspiracy] was supported and strengthened when the distributors, with like unanimity, failed to tender the testimony, at their command, of any officer or agent of a distributor who knew, or was in a position to know, whether in fact an agreement had been reached among them for concerted action. * * * The failure under the circumstances to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they had acted in pursuance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to appellants. The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. Silence then becomes evidence of the most convincing character. [306 U.S. 208, 225-26 (1939); citations omitted.]

In this case, defendants did not even offer "weak evidence" to rebut the inference of conspiracy. Unlike the

defendants in *Interstate Circuit*, who at least provided the testimony of local managers that they had acted independently, not a single officer or employee of any defendant took the stand to explain his actions. Obviously, such testimony, if it existed, was "at the command" of defendants. In fact, the record reflects that Georgia-Pacific intended to call as witnesses its former Chairman of the Board as well as the Director of its Distribution Division, but chose to withdraw them at the last moment. TR 2721-22, 2785-91. The jury was fully justified in inferring from defendants' silence that their officers and employees did not take the stand to deny collusion because they would have been compelled to admit that collusion had in fact existed.

In place of testimony directly refuting the evidence of conspiracy, defendants' lawyers now devise explanations for defendants' pricing practices which are simply not credible. As to west coast freight, the lawyers argue that the challenged pricing formats were adopted because they facilitated price comparisions with western plywood and because they were induced by the demand of buyers. G-P Brief at 43; Wey. Brief at 45.[28] Phantom freight is obviously not necessary to give the buyer a basis for comparison, however. Any quotation showing the full delivered price of southern plywood would give the buyer the basis for comparison. Indeed, the buyer would obtain more information from a price quote that showed true freight costs, for this information would enable the buyer to determine whether it could save money by picking the plywood up at the mill, locating a new facility closer to a mill, or buying from a nearer mill.

Although defendants offered excerpts from the deposition testimony of representatives of four plywood buyers,

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[28] Defendants failed to produce any testimony from their officers or employees that these were the reasons underlying the manufacturers' pricing practices, or any evidence that the manufacturers, at the time of the conspiracy, ever considered these "justifications" to be applicable.

not one testified that he "preferred" this pricing format over any other or that he would have stopped buying plywood from a manufacturer that discontinued its use of such practices.

There is also substantial evidence that purchasers complained about the practice of charging west coast freight and contended that only actual freight should be charged. *E.g.*, PX 44 (JA 397, TR 1004), PX 233 (JA 408, TR 1510); TR 1005-06.[29] A 1971 internal Georgia-Pacific memorandum described one such complaint from a customer who requested a written explanation for the west coast freight policy. PX 1 (JA 382, TR 2185). In response, the Vice President of Sales recommended that no such explanation be given. Instead, he suggested a personal visit to the customer

> to find out just what his motives are, if we do not already know, and to personally discuss our program of *quoting on a net delivered basis only*, regardless of origin of the material—West or South. [PX 2 (JA 383, TR 2187); emphasis added.]

Despite defendants' arguments that theirs was a simple pricing system that was advantageous to buyers, there is significant evidence from their documents to the contrary. Willamette, for example, in considering whether to stop using west coast freight and association weights in 1974, concluded that the adoption of f.o.b. mill pricing would "enable us to give a clearer, more concise price to our customer." PX 756 (TR 2689).

Customers also complained about being charged for association weights on western plywood. Indeed, some

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[29] There can be no greater complaint than the filing of this litigation by many purchasers prior to the institution of the government investigation. Moreover, the trade association representing thousands of purchasers has moved for leave to file an amicus brief reflecting their complaints against the defendants' practices.

customers resorted to "withholding payment in the amount of the underweights." PX 347 (JA 420, TR 1909, 2689).

The lawyers' excuses for association weights likewise are not credible. They claim it was necessary to use association weights because defendants sometimes contracted for the sale of plywood before the plywood was produced. G-P Brief at 2, 7; Wey. Brief at 4, 15. This explanation is belied by the fact that defendants paid the railroads according to average weight agreements which, unlike the association weights used by defendants, were based on recent production experience and thus closely approximated the actual weight of plywood. *See, e.g.*, PX 425 (TR 1345), PX 505 (TR 1241).

C. The Jury Was Justified in Connecting the Settled Co-Conspirators to the Conspiracy to Fix the Price of Plywood

The jury's verdict with respect to the settled defendants whom the trial defendants now describe as "absent co-conspirators" likewise should not be disturbed.[30] Defendants assert that nothing more than parallel conduct links these plywood manufacturers to the conspiracy, that there was therefore insufficient evidence against these manufacturers, and that they were included in the conspiracy through an improper application of the "slight evidence" rule. G-P Brief at 46-50; Wey. Brief at 34.[31] Defendants

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[30] The jury found that defendants and other "Southern Pine Plywood Manufacturers" engaged in a conspiracy to fix prices through the use of west coast freight (APP I-1, 2) and that defendants and "all other manufacturers of softwood plywood" conspired to fix the price of western plywood by using association weights (APP I-2, 3). It was clearly understood throughout the trial that these terms referred to the 34 alleged co-conspirators listed in PX 460 (TR 2621, 2629). *See* TR 2621-28.

[31] Under this rule, once the existence of a conspiracy is established, only a minimal level of supplemental evidence is required to connect an additional individual to it. *See* United States v. Consolidated Packaging Corp., 575 F.2d 117, 126 (7th Cir. 1978); Taxi Weekly, Inc. v. Metropolitan Taxicab Bd. of Trade, Inc., 539 F.2d 907, 915 (2d Cir. 1976).

failed to raise this argument in the Court of Appeals and thus should not be permitted to raise it here. *See Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[32]

In any event, the evidence shows that the jury was wholly justified in finding an industry-wide conspiracy. In addition to the unrefuted evidence that all manufacturers in the industry adhered to the challenged pricing practices and knew that all their "competitors" were doing the same,[33] there was substantial direct and circumstantial evidence linking defendants and settled co-conspirators alike to the conspiracy.[34] As detailed above,[35] Weyerhaeuser's Tweedie documented his communications with numerous settled co-conspirators on such subjects as price, the west coast freight pricing system for southern plywood, stockpiling of plywood, transfer pricing, contract sales prices, outside plywood purchases, production capacity, actual production, and maximizing freight return.[36] Other documentary and testimonial evidence firmly

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[32] Although defendants state that these issues were raised "at page 53 of their opening brief to the Fifth Circuit" (G-P Brief at 48 n.33), that page presents only the argument that "opportunity evidence" was insufficient to support *any* finding of conspiracy. The brief nowhere specifically disputes either the sufficiency of the evidence against settled co-conspirators or the trial court's allusion to the slight evidence rule. Incredibly, having failed to assert this point, defendants then criticize the Fifth Circuit's "casual approach" to the issue. Wey. Brief at 34.

[33] *See* pp. 18-22 *supra*.

[34] *See* Section I.B.1 *supra*.

[35] *See* note 11 *supra*.

[36] *See, e.g.*, the following documents proving that Tweedie and other Weyerhaeuser employees communicated and conspired with defendants' so-called "absent co-conspirators": Georgia-Pacific (PX 177 (TR 350, 400), PX 180 (JA 401, TR 364, 2662), PX 182 (JA 405, TR 372, 2662)); Willamette (PX 183 (TR 434, 2662), PX

[Footnote continued]

established that the settled co-conspirators were in frequent, direct communication both with the defendants and with each other, often regarding these and other competitively significant subjects.[37] Moreover, plaintiffs' expert witness testified that under conditions of competition, no manufacturer would have charged phantom freight or weight. JA 348-51.

Nevertheless, defendants assert that the court below connected absent parties to the alleged conspiracy on the

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[36] [Continued]

190 (TR 1500)); Arkla (PX 183 (TR 434, 2662)); Boise Cascade (PX 189 (TR 1495, 1772), PX 192 (TR 1495, 1500), PX 193 (TR 1495, 1500)); Dixon (PX 183 (TR 434, 2662)); International Paper (PX 190 (TR 1500), PX 192 (TR 1495, 1500)); Kirby (PX 183 (TR 434, 2662), PX 192 (TR 1495, 1500)); Louisiana-Pacific (PX 192 (TR 1495, 1500)); MacMillan-Bloedel (PX 183 (TR 434, 2662), PX 192 (TR 1495, 1500)); Medford (PX 193 (TR 1495, 1500)); Owens-Illinois (PX 192 (TR 1495, 1500)); Scotch (PX 183 (TR 434, 2662)); Temple, Tremont (PX 192 (TR 1495, 1500)); Union Camp (PX 183 (TR 434, 2662), PX 192 (TR 1495, 1500)); U.S. Plywood and Vancouver (PX 192 (TR 1495, 1500)).

[37] *E.g.*, PX 28 (TR 2190, 2297) (Georgia-Pacific—Owens-Illinois, Temple); PX 31 (TR 939, 941) (Georgia-Pacific—MacMillan-Bloedel, Olinkraft, Owens-Illinois, Union Camp); PX 186 (TR 447, 701) (Arkla-Weyerhaeuser); PX 242 (TR 2689) (Weyerhaeuser—International Paper, Kirby, Louisiana-Pacific, Union Camp, Willamette); PX 296 (TR 1431) (Boise Cascade—Georgia-Pacific, Olinkraft, U.S. Plywood); PX 333 (TR 1860) (U.S. Plywood—Boise Cascade, Simpson); PX 370 (TR 2689) (Evans—Kirby); PX 501-C (TR 1202, 1495) (Evans—Owens-Illinois); PX 924 (TR 1746) (Willamette—Bohemia); TR 385 (Weyerhaeuser—Arkla, Louisiana-Pacific, MacMillan-Bloedel, Owens-Illinois, Scotch, Tremont, Union Camp, Vancouver); TR 545-46 (Potlatch—Olinkraft); TR 573-74 (Georgia-Pacific—International Paper, Kirby, Olinkraft, Owens-Illinois, Temple, Willamette); TR 1435-40 (Boise Cascade—Georgia-Pacific, Louisiana-Pacific, U.S. Plywood, Vanply); TR 1695-97 (Willamette—Evans, Georgia-Pacific, U.S. Plywood); TR 1739-68 (Willamette—Anthony Forest Products, Boise Cascade, Georgia-Pacific, International Paper, St. Regis, Temple, Union Camp, U.S. Plywood, Weyerhaeuser); TR 1871-1904 (Champion—Anthony Forest Products, Arkla, Boise Cascade, Georgia-Pacific, Owens-Illinois, Scotch, Temple, Vancouver, Willamette).

basis of nothing more than parallel conduct. G-P Brief at 46. This argument is as fallacious with respect to the settled co-conspirators as it is with respect to defendants themselves. The industry members' "parallel conduct" cannot be viewed in isolation from the substantial record evidence of the nature and purpose of that conduct as an integral part of the conspiracy, and of the unity of action required for the success of the plan. *See* Sections I.B.1, I.B.3 *supra*.[38]

Moreover, as noted by the District Court in the instant case,

> The defendants did not choose to dispute at trial these broad assertions [of an industry-wide conspiracy] with evidence showing variations from the industry norm by any of these other manufacturers. [APP C-3; footnote omitted.]

The jury was not permitted to connect the settled co-conspirators to the conspiracy on the basis of anything less than a preponderance of the evidence. The District Court's instructions did not differentiate between the standards to be applied to the defendants and those applicable to the other plywood manufacturers. JA 190-93. The only reference to the slight evidence rule in the course of the entire proceedings was made by the District Court in denying defendants' motion for judgment notwithstanding the verdict, after the jury had reached its conclusion. The District Court noted that the slight evidence rule could not be less appropriate in a civil case than in a criminal case, particularly where, as here, the only question is the extent of the responsibility of a conspirator who has been substantially connected with the conspiracy. APP C-3, 4.

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[38] Because this is not a case of mere parallel conduct, First National Bank v. Cities Service Co., 391 U.S. 253 (1968), on which defendant Georgia-Pacific heavily relies (G-P Brief at 34-36), is not applicable.

It is, in any event, not necessary to resort to the slight evidence rule in this case.[39] There was substantial evidence that *all* the co-conspirators—including defendants—engaged in a conspiracy to establish and maintain artifically high prices for plywood. Therefore, regardless of which rule is applied, the jury's verdict should be upheld.

D. The District Court Properly Instructed the Jury on the Conspiracy Issue

Despite the overwhelming evidence of conspiracy, defendants assert that the trial court's instructions "permitted [the jury] to infer a conspiracy from parallel practices and contacts among competitors where it was shown only that they had opportunities to conspire—*and nothing more.*" G-P Brief at 37; emphasis in original. *See also* Wey. Brief at 40. The District Court's instructions do not support this contention.

The trial court properly instructed the jury that the use of west coast freight and association weights violated Section 1 of the Sherman Act "*only* if they were done as a result of contract, combination, or conspiracy." JA 180; emphasis added. The court used the word "agreement" to describe this requirement *no fewer than 30*

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[39] The slight evidence rule is good law in a civil context. *See* United States v. Consolidated Packaging Corp., 575 F.2d at 126; Taxi Weekly, Inc. v. Metropolitan Taxicab Bd. of Trade, Inc., 539 F.2d at 915; Vandervelde v. Put & Call Brokers & Dealers Ass'n, 344 F. Supp. 118, 155-56 (S.D.N.Y. 1972); Riss & Co. v. Association of Am. Railroads, 187 F. Supp. 306, 313 (D.D.C. 1960).

Defendants' suggestion that Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100 (E.D. Pa. 1981), rejected the slight evidence rule in the civil antitrust context is plainly wrong. To the contrary, while the court refused to apply the slight evidence rule in deciding a summary judgment motion, it expressly acknowledged it as the correct standard for appellate review of jury verdicts. *Id.* at 1169. In this regard, the court relied upon the Third Circuit's decision in United States v. Cooper, 567 F.2d 252, 253 (3d Cir. 1977).

times in the course of its instructions.[40] The court's instructions leave no doubt that the jury was aware of the need to find concerted action before concluding that a violation occurred.

The court cautioned the jury that it could not base a finding of concerted action upon evidence of parallel action alone:

> In this case, a manufacturer of plywood on its own may decide to use West Coast freight in the pricing of southern pine plywood or may use standard weights in selling western fir plywood. * * * It may do so on its own lawfully under Section 1 of the Sherman Act even if other manufacturers are following the same or similar practices, and even if it knows the other manufacturers are following those practices. In and of itself, a manufacturer may on its own adopt practices that are followed and used by other people in the industry. [JA 180.]

The court also emphasized that communications among industry members were not "in and of themselves" illegal:

> There has been evidence of manufacturers talking with one another, obtaining pricing information from one another, buying from one another, including long term contracts. These practices, these transactions, these contacts in and of themselves are not illegal. Indeed, they may be vehicles for fostering competition. [JA 185.]

The court specifically noted the limited relevance of "opportunity" evidence:

> Now, the fact that manufacturers attended trade meetings, participated in trade discussions, likewise, *in and of itself is not illegal under the Sherman Antitrust Act* and, indeed, may be evidence or a means

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[40] In fact, the court used some form of the word "agree" in this context at 52 separate points during its charge to the jury.

> for fostering competition. On the other hand, such evidence is evidence that there was some opportunity for persons to have agreed or to have gotten together to assure that some previously agreed upon matter was being carried out. I, of course, would call to your attention that *the mere fact that there be opportunity to meet or to agree does not mean that any particular agreement was or was not entered.* It is merely one part of the total of the circumstantial evidence that you will be dealing with. [JA 185; emphasis added.]

Defendants assert that the court erred by failing to give limiting instructions advising the jury that it could infer conspiracy *only* if plaintiffs established that each defendant manufacturer engaged in conduct "that would be against each firm's self interest if undertaken independently, and would be in each firm's interest only if undertaken collectively." Wey. Brief at 43.[41]

In effect, defendants asked the trial court to instruct the jury that a showing of adverse self interest is always necessary regardless of the amount or weight of the other evidence. *See* JA 156-57. This is an inaccurate statement of the law. Even the lower court cases on which defendants rely at most suggest that mere parallel action, with no other evidence of agreement and with no showing that the acts are inconsistent with the firms' self interest,

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[41] Defendants also ascribe error to the trial court's failure to give additional limiting instructions "on the proper inferences to be drawn from a showing of nothing more than parallel action, coupled with opportunity contacts." G-P Brief at 37. Defendants failed to offer any proposed instructions on this point, however, and they did not raise this objection either at trial or in their brief to the Fifth Circuit. Thus, they may not raise the issue here. Adickes v. S.H. Kress & Co., 398 U.S. at 147 n.2. In any event, the trial court was not required to "compartmentalize" the evidence in this manner. *See* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962). Such an instruction would have totally misled the jury as to the evidence introduced in this case.

does not give rise to an inference of collusion.[42] Indeed, defendants cite *no* case in which a court reversed a jury verdict based on a failure to give an instruction such as they proposed or otherwise suggested that such an instruction would be appropriate.[43]

Even under defendants' theory, however, the jury verdict still must not be disturbed. The trial court's charge

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[42] For example, defendants place great reliance on a statement from Proctor v. State Farm Mut. Auto. Ins. Co., 675 F.2d 308 (D.C. Cir.), *cert. denied*, 51 U.S.L.W. 3225 (U.S. Oct. 5, 1982), noting that parallel behavior that is not against self interest does not give rise to an inference of agreement. Defendants fail to disclose that this statement immediately follows the court's assertion that "[p]arallel business behavior *alone* * * * is inadequate to create an inference of concerted action necessary to establish a Sherman Act violation." 675 F.2d at 327; emphasis added.

Similarly, the Eighth Circuit's articulation of this "standard" in Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877 (8th Cir. 1978), referred only to those cases in which parallel action is the *only* evidence before the court. *Id.* at 884. *See also* Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656, 661 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963); Chorak v. RKO Radio Pictures, Inc., 196 F.2d 225, 229 (9th Cir.), *cert. denied*, 344 U.S. 887 (1952).

The other cases cited by defendants are equally unpersuasive, since in each, the evidence offered in addition to that of parallel action was truly *de minimis*. *See* Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981); Weit v. Continental Illinois Nat'l Bank & Trust Co., 641 F.2d 457, 462 n.17 (7th Cir. 1981), *cert. denied*, 102 S.Ct. 1610 (1982); Venzie Corp. v. United States Mineral Products Co., 521 F.2d 1309, 1312 (3d Cir. 1975); Workman v. State Farm Mut. Auto. Ins. Co., 520 F. Supp. 610, 617 (N.D. Cal. 1981); Harlem River Consumers Coop., Inc. v. Associated Grocers of Harlem, Inc., 408 F. Supp. 1251, 1278 (S.D.N.Y. 1976).

[43] A party is not entitled to have instructions given in precisely the form and language requested. Railway Co. v. McCarthy, 96 U.S. 258, 265-66 (1878). Even when instructions contain technical deficiencies, reversal is not justified if the instructions, taken as a whole, adequately state the law and are not likely to confuse or mislead the jury. United States v. Park, 421 U.S. 658, 675-76 (1975).

was more than adequate to inform the jury of the need to consider whether the manufacturers' pricing system was consistent with the hypothesis that each competitor acted independently. The court specifically instructed the jury that in considering whether to draw an inference of conspiracy from the fact of parallel conduct,

> you would want to consider whether the different manufacturers adopting such practices were doing so *because of their own independent best judgment as to what was in their best economic interest to do so*, independent of any commitment or agreement from other people to do the same thing. In deciding this issue and in deciding what inference, if any, to draw, you would want to consider whether the practices that were being employed *made sense in the light of the economic industry conditions and whether or not the benefits from those practices, continuation of those practices, were or were not dependent on other people, other manufacturers doing the same thing.* [JA 187; emphasis added.]

Even the United States, which advocates a stringent standard of instruction, agrees that the trial court adequately instructed the jury on the conditions necessary for a finding of conspiracy.[44]

As discussed above, the plaintiffs did offer substantial evidence that the plywood manufacturers' parallel con-

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[44] In its amicus brief, the Government suggests that a plaintiff "should be allowed to introduce evidence of parallel conduct to supplement other evidence of agreement, direct or circumstantial, *only* if he is prepared to show that the parallel conduct was inconsistent with the defendants' independent competitive interests and, hence, unlikely to occur absent collusion." U.S. Amicus Brief at 10; footnote omitted; emphasis added.

While it is of no moment in terms of the outcome of this case, we would reformulate the Government's rule. Once there is other evidence of an illegal pricing agreement, the plaintiff may supplement this with evidence of parallel action but is not required to show further that the parallel action was inconsistent with the defendants' self interest.

duct was in fact inconsistent with their independent competitive interests. As noted by the United States in its amicus brief, such a showing ordinarily would take the form of "expert testimony that the parallel conduct was of a kind unlikely to occur in a competitive market because, absent collusion, it would be contrary to the self-interest of the firms involved." U.S. Amicus Brief at 10 n.7. Here, plaintiffs' economic expert, Barber, testified that the pricing system utilized by defendants and the other plywood manufacturers was "not consistent with normal competitive behavior" (JA 319) and that at times "the defendants and other companies, had to do things and did things that were not in their economic self interest in a competitive market." *Id.* Barber's testimony was amply supported by other evidence in the record. *See* Section I.B.3 *supra.*

Thus, the court correctly charged the jury. *See* U.S. Amicus Brief at 14.

II. THIS COURT SHOULD NOT UPSET THE JURY'S VERDICT ON DAMAGES

A. Introduction

This is an unusual case only in one respect: the specificity with which plaintiffs were able to prove the precise measure of the overcharges. The evidence showed that defendants agreed to charge their customers for fictitious freight and weight, that they systematically did charge plaintiffs the amounts of fictitious freight and weight, and that they regularly treated and reported these charges as additional profits in their own contemporaneous financial records. This evidence established a *prima facie* case that plaintiffs were injured by the amount of the charges for the fictitious freight and weight. Plaintiffs' initial burden of proof was thus satisfied, and it became defendants' burden to rebut plaintiffs' showing. Defendants wholly failed to offer any such rebuttal evidence.

Even if plaintiffs had the burden to prove more specifically the effect of defendants' practices on delivered price,

plaintiffs introduced substantial evidence, including expert testimony, that defendants' conspiratorial acts did in fact raise the total price of plywood by the amount of the false charges. Defendants also wholly failed to rebut this showing.

The only damage issue presented by the evidence was whether the plaintiffs proved their contention that the measure of damages was the amount by which west coast freight charges exceeded actual freight charges on southern plywood and the amount by which freight charges based on association weights exceeded freight charges for actual weights on western plywood. The trial court properly tailored the charge and interrogatories to present this issue to the jury. There is no basis upon which the jury verdict can or should be overturned.

B. The Testimony and Documents Support the Jury's Verdict

1. *Southern plywood and the conspiracy to add west coast freight*

The defendants' own documents show unequivocally that the southern manufacturers intended to raise the delivered price of southern plywood by the amount of the charge for phantom freight.

The pricing plans of the southern manufacturers called for raising the price of the southern plywood so as not to undercut the higher delivered price of plywood shipped from the West. Weyerhaeuser acknowledged that generally purchasers were to pay "exactly the same [delivered] price" for southern and western plywood. TR 811. *See also* JA 296. International Paper's pricing plan for its southern mills likewise called for raising the delivered price of southern plywood by adding west coast freight to the west coast "f.o.b. mill" price. Thus, the "net to mill" in effect was raised by the amount of the difference between west coast freight and actual freight. PX 524 at 7 (TR 2677, 2689), PX 525 at 7 (TR 2675, 2689).

Willamette's pricing documents show that its equalization program raised the delivered price of its plywood by the amount of the charge for phantom freight. Willamette's internal pricing memoranda for products including southern plywood state: "These prices include approximately $12 per thousand freight equalization." PX 728 (TR 2710), PX 729 (TR 2710).

The feasibility study for Weyerhaeuser's Jacksonville, North Carolina, plant shows that Weyerhaeuser's intent was to price the southern plywood so the mill could realize as "incremental gain" the difference between west coast freight to be charged customers and actual freight costs. PX 227 (TR 2689). Feasibility studies for Georgia-Pacific and International Paper Company plants also evidence the southern producers' intent to raise the price of southern plywood by the amount of the phantom freight charges. PX 7 (TR 1966), PX 51 (TR 673), PX 54 (TR 1947), PX 524 (TR 2677, 2689). Thus, the southern manufacturers relied on their profits from freight gain to decide whether to spend millions of dollars on new plants and equipment. *See, e.g.*, PX 7 (TR 1966), PX 51 (TR 673), PX 52 (TR 690, 693), PX 53 (TR 690, 693), PX 54 (TR 1947), PX 55 (TR 2689), PX 56 (TR 2689). (PX 53 is reproduced as Appendix A to this brief.)

Georgia-Pacific even budgeted for expected future freight gain (PX 20 (JA 386, TR 230, 936); TR 610-11, 679-81), as did Willamette (PX 728 (TR 2710), PX 729 (TR 2710), PX 912 (TR 1714-15); TR 1714-16). Moreover, Union Camp Corporation carried freight gain as a line item in projecting its annual "Net Sales Return" on southern plywood. PX 530 at 6, 19 (TR 2689). Similarly, International Paper carried "freight gain" as an "income" item in its "summary of earnings." PX 524 at 3 (TR 2677, 2689), PX 525 at 3 (TR 2675, 2689).

Defendants successfully carried out their intention, and achieved their objective. The southern manufacturers did, in fact, charge west coast freight. They followed a for-

mula whereby they added west coast freight to the mill price.[45] Consequently, delivered prices of southern plywood sold to buyers in different locations varied by the difference in west coast freight charges to the buyers' locations. As explained by Weyerhaeuser, "the freight increases as you go East and the delivered price is higher and the return to the mill is better." JA 283. Willamette agreed. PX 903 (JA 465, TR 1685); TR 2064-65. *See also* PX 537 (TR 2215), PX 539 (JA 440, TR 2219); TR 2215-19. West coast freight was charged even when buyers took delivery at the mill. *E.g.*, PX 233 (JA 408, TR 1510).

The evidence also shows that the full amount of the freight pickup flowed into defendants' treasuries as extra profits. Defendants carried the "incremental [freight] gain for the mill" on their financial records as profits and revenues (e.g., PX 50 (TR 666), PX 320-325 (TR 1802)), and their deposition testimony confirmed that these revenue items were profits. (PX 325 is reproduced as Appendix B to this brief.) Georgia-Pacific testified through deposition that freight pickup was a "profit item" (TR 616); "the greater the freight pickup, the more profit to the company." TR 623-24. Further, Georgia-Pacific maintained an "invoice register" (PX 207 (TR 192), PX 410 (JA 425, TR 1956), PX 589 (JA 447, TR 1961-62)) on which it compiled "freight gain" as a revenue item on each invoice (PX 410 (JA 425, TR 1956)), and compiled elaborate freight gain tables, which it conceded were not needed for competitive purposes. TR 230-36. (PX 589 at 30 is reproduced as Appendix C to this brief.)

Willamette similarly calculated and internally reported freight pickup revenues for its southern mills. PX 570-79 (TR 2710), PX 580-87 (TR 2689), PX 735 (TR 2010), PX 757 (TR 1767, 2072), PX 777 (TR 2071-72); TR 2072-76. Weyerhaeuser wrote that an increase in freight

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[45] *See* Section I.B.2 *supra*.

pickup would result in higher "General Sales profit." PX 223 (TR 832).[46]

The evidence shows that the other southern conspirators also achieved the objective of realizing as profits the phantom charges for west coast freight. For example, the Vancouver Plywood Company testified that freight gain was compiled on a daily basis by the company (PX 247 (JA 412, TR 1472); TR 1472-73, 1511-15), and was a revenue item reported in monthly financial statements. PX 248 (TR 1519), PX 259 (TR 1539); TR 1531-32, 1539. U.S. Plywood booked freight pickup as a revenue item. PX 320-325 (TR 1802). Boise Cascade accounted for freight pickup (TR 1306, 1607-08, 1620, 1631), and acknowledged that if freight pickup increased, the profitability of its plant would increase. TR 1610, 1631-32.

2. *Western plywood and the conspiracy to add phantom weight*

The evidence that the west coast conspirators raised the delivered price of plywood by the amount of the freight charges for non-existent weight is likewise compelling.

Georgia-Pacific virtually conceded plaintiffs' claim, testifying that it is "standard in the industry" for manufacturers to use "agreed on weights" that are heavier than actual weights, and that the sellers "pocketed [the difference] as an additional profit * * *. That's what I mean by underweights." JA 247. *See also* TR 1711.

U.S. Plywood likewise described the use of underweights:

> All softwood plywood shipped from western mills, whether it be shipped prepaid or collect, is shipped on the basis of guaranteed or association weights. The mills pay the actual freight and the difference is called underweights and is retained by the mills. [PX 347 (JA 420, TR 1909, 2689).]

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[46] The Fifth Circuit noted the abundant, cumulative evidence to the same effect. APP A.

U.S. Plywood acknowledged that in arriving at the delivered price of plywood, no matter what the negotiations and agreement with the customer, "I can assure you that the mill will always add to its price to still protect their underweights." PX 347 (JA 420, TR 1909, 2689). Regardless of extraneous forces in the market, such as housing starts and weather, underweights were, inexorably, fixed additions to the price. JA 324-25. *See* Section I.B.2 *supra.*

As underweights increased, the return to the mill increased. JA 262; TR 631-32. Testimony and financial records of one manufacturer after another showed that all treated underweights as profit. Georgia-Pacific (PX 49 (TR 660), PX 59-68 (TR 1649-51); JA 247; TR 634, 658-63, 1664-65); Weyerhaeuser (PX 221 (TR 2689, 2696); TR 2696-97); Willamette (PX 430 (TR 2689, 2704), PX 431-33 (TR 2689), PX 708-710 (TR 2689), PX 713-715 (TR 2689)); Boise Cascade (PX 295 (TR 1427); TR 1403-04, 1409, 2522-23); Simpson (PX 446 (TR 2698)); International Paper (PX 519 (TR 2678, 2689)). *See generally* JA 272-73.

3. *The expert testimony*

Plaintiffs' expert economic witness, Barber, testified that defendants' conspiratorial acts raised prices artificially by the amount of the charges for phantom freight and weight. After conducting an independent study and reviewing the entire record (JA 315), he testified:

> Q. What in your opinion was the effected [*sic*, effect of] west coast southern plywood pricing practice[s] on prices of southern pine plywood paid by the purchasers?
>
> A. * * * [T]he Defendants * * * raised prices to the buyers and raised revenue flowing into the company[; the system] boosted their revenue artificially just as it boosted the prices to the buyers and *shifted that additional revenue from the consumer over to the company.* [JA 325; emphasis added. *See* JA 321.]

He gave the same opinion as to underweights:

> The effect of that as well was to raise the price artificially and uniformly among all the sellers as part of their system[;] to raise the price that was paid by the buyer and to shift that piece of money, that underweight revenue over into the accounts of the company. [JA 325. *See* JA 317.]

He concluded that the freight gain and underweights were an extra "layer of fat." JA 324.

These conclusions are corroborated by the testimony of defendants' expert, Steiner, who testified that the base price in the South was equal to the price that would be set by the forces of supply and demand, and that freight would have to be added to that base. TR 2931-39, 2962. Since in competitive markets no producers would charge for any fictitious freight and weight (JA 333-34; *see* JA 320, 325), the fact that they did so here is convincing proof that the delivered price was raised by the amount of such charges.[47]

C. The Overcharges Are, *Prima Facie*, the Measure of Damages

Here the appropriate measure of damages was dictated by the unusually specific evidence of the extent of injury. Defendants' blatant conspiracy to charge for fictitious freight and weight, and their equally blatant segregation on their own financial records of the spoils of their conspiracy, provided direct proof of the exact harm caused. Thus, the facts furnished a most logical, clear-cut and realistic measure of damage to the plaintiff class.

In a horizontal price fixing case brought under Section 1 of the Sherman Act, plaintiffs make a *prima facie* case

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[47] The conditions in the plywood markets would have been competitive if there were no conspiracy. There were numerous producers, and producers had excess capacity. *See* TR 2471-72, 2889-90, 2902, 2919, 2958-59, 2961, 3022, 3025-26, 3120, 3157. *See also* Section I.B.2 and note 24 *supra*.

on measure of damages when, having proved conspiracy, they establish the extent of overcharge on one component of the price. From this evidence, the jury may find injury in the amount of the overcharge. When firms conspire on one element of price, it is unrealistic to assume that they undermined their own conspiracy by reducing another element of price.

This conclusion flows from *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980) (per curiam). In *Catalano*, defendants, wholesale sellers of beer, conspired to refuse to give credit to their customers. This Court said:

> It is virtually self-evident that extending interest-free credit for a period of time is equivalent to giving a discount equal to the value of the use of the purchase price for that period of time. [*Id.* at 648; footnote omitted.]

While defendants in *Catalano* argued that there could have been price competition on other elements of price that nullified the impact of their conspiracy, the Court said:

> While it may be that elimination of a practice of giving variable discounts will ultimately lead in a competitive market to corresponding decreases in the invoice price, that is surely not necessarily to be anticipated. It is more realistic to view an agreement to eliminate credit sales as extinguishing one form of competition among the sellers. [*Id.* at 648-49.[48]]

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[48] Defendants distort *Catalano*. They quote the Court's language that the sellers' elimination of discounts could "ultimately lead in a competitive market to corresponding decreases in the invoice price * * *." Wey. Brief at 56; G-P Brief at 18. They studiously avoid reference to the words in the same sentence that immediately follow.

In stark contrast to defendants' treatment of *Catalano*, the Business Roundtable and the National Association of Manufacturers, in their brief *amici curiae*, acknowledge that in *Catalano*:

[Footnote continued]

The defendants in *Catalano* presumptively harmed their customers in the amount of the value of the credit they conspiratorially terminated. Likewise, the plywood manufacturers harmed plaintiffs in the amount of the charges for false freight and weight.

But assuming *arguendo* that more specific proof of the effect of overcharges on total price is required to establish damages, plaintiffs also met that burden. Plaintiffs introduced substantial evidence that the delivered price of plywood was raised by the amount of the overcharges for freight and weight. They showed, for example, that defendants used a formula to fix full price; that defendants intended to raise price by the amount of the fictitious charges; that defendants refused to negotiate away the benefits of the overcharges; and that defendants treated the fictitious charges as extra profit on their own books. It has long been established that, when the plaintiff has made a reasonable showing of the probable amount of the harm it has suffered, it has satisfied its burden to prove damages. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).[49]

Defendants' contention that plaintiffs must prove by indirect means a hypothetical price that would have prevailed in the absence of conspiracy is wrong as a matter

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[48] [Continued]

The Court recognized that a seller's conspiratorial elimination of interest-free credit was likely to increase the effective total purchase price of the product. [p. 14.]

[49] This Court said in *Bigelow*:

Any * * * rule [that would place undue burdens on plaintiffs] would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. [327 U.S. at 264.]

of law and inappropriate as a matter of policy.[50] In this case, the readily identifiable overcharge provided a direct and precise measure of damages to the class. No court has ever required a litigant to use hypothetical and indirect methods of proof when direct and accurate measures are at hand.

Even where direct proof is not available, the law does not require plaintiffs to construct a hypothetical price. This Court has specifically observed that conspiracies may "preclude[] ascertainment of the amount of damages * * * more precisely, by comparison of * * * prices * * * as affected by the conspiracy, with what they would have been in its absence under freely competitive conditions." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. at 264. Thus, the Court has refused to impose this burden of creating a hypothetical price on plaintiffs. *Id.*

The teaching of *Bigelow* rests soundly upon the policy favoring vigorous enforcement of the antitrust laws and recognizing the practical limits of proof.[51] In *Illinois*

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[50] Defendants' reliance on J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981), *on remand*, 670 F.2d 575 (5th Cir.), *cert. denied*, 51 U.S.L.W. 3275 (U.S. Oct. 12, 1982), is misplaced. *Truett Payne* was a private, treble damage Robinson-Patman case. Under the Robinson-Patman Act, a plaintiff suing for treble damages must prove that it was a victim of a price discrimination, that the effect of the price discrimination may be substantially to lessen competition, and that the plaintiff sustained injury attributable to harm to competition. *Id.* at 561-62. In *Truett Payne*, the Court declined to rule on damages in view of the fact that the Court of Appeals had not ruled on whether there was a violation. By contrast, in this case plaintiffs proved a price fixing conspiracy which is a *per se* violation of the Sherman Act (and does not depend upon proof of harm to competition generally). Moreover, plaintiffs here proved actual damages.

[51] The practical difficulties of plaintiffs' extracting useable cost information from defendants cannot be overestimated. The opportunities for abuse of the litigation process are well documented. *See Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures* 82 (1979). The party that controls the facts has inordinate

[Footnote continued]

Brick Co. v. *Illinois*, 431 U.S. 720, 731-32 (1977), the Court reaffirmed this policy, emphasizing the difficulties in analyzing price and output decisions in the real world and "the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom." More recently in *Blue Shield of Virginia* v. *McCready*, 102 S.Ct. 2540, 2546-47 n.11 (1982), the Court declared that the law must:

> avoid burdening § 4 actions with damages issues giving rise to the need for "massive evidence and complicated theories," where the consequence would be to discourage vigorous enforcement of the antitrust laws by private suit.[52]

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[51] [Continued]

opportunities to control the case. Here, defendants Willamette and Georgia-Pacific took advantage of their opportunities. They withheld some of the documents most probative of damages (including invoice registers, which recorded freight pickup and tabulations of underweights), and sanctions were imposed upon them for their misbehavior. APP A-16.

[52] This Court has consistently rejected the use of complicated theories. For example, in Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), the Court rejected defendants' claim that plaintiffs' damages should be diminished by the extent to which plaintiffs passed on overcharges to their customers, and it held that pass-on is no defense. The same policy that underlies *Hanover Shoe* is relevant here. The Court said in *Hanover Shoe*:

> We are not impressed with the argument that sound laws of economics require recognizing this defense. A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different * * *, he would have chosen a different price.
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> * * * In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness. [*Id.* at 492-93; footnote omitted.]

To create an inflexible requirement that a plaintiff must construct a hypothetical price that would have prevailed but for the conspiracy would undermine the Court's recent efforts to achieve clarity, efficiency and reasonable simplicity in complex antitrust litigation.

D. In the Face of Plaintiffs' Overwhelming Proof of Measure of Damages, Defendants Did Not Even Attempt to Introduce Rebuttal Evidence

Plaintiffs decisively established a *prima facie* case that they were overcharged in the amount of phantom freight and weight. The burden was on defendants to rebut it.[53] Yet they came forward with no rebuttal evidence. They produced no officer or employee of any defendant as a live witness at trial, and introduced no other evidence to show that damages were less than the full charges for phantom freight and weight.[54] No witness came forward to explain the freight gain tables; no one explained the invoice registers or the line items in their financial statements. It was their strategy not to offer such rebuttal

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[53] Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916); Westinghouse Elec. & Mfg. Co. v. Wagner Elec. & Mfg. Co., 225 U.S. 604 (1912).

If, as defendants imply, the mill price was lower than it would have been if defendants did not charge west coast freight or association weights, then part of the amounts that defendants segregated on their books as profits and revenues from freight gain and underweights was not what it purported to be. The freight gain and underweight figures would include a component that represents either additional mill costs or extra mill profits attributable to market power of individual defendants. If this were so, then defendants had the burden to prove it. Defendants would in effect have commingled the unlawful gains from their conspiracy with their lawful charges. Where the wrongdoer has commingled elements of damage, or caused confusion, the "burden of separation is cast on defendant." *Id.* at 622.

[54] Defendants' silence is potent evidence that plaintiffs were injured to the full extent of the charges for false freight and weight. *See* Interstate Circuit, Inc. v. United States, 306 U.S. at 226 (1939): "Silence [is] evidence of the most convincing character." *See also* Section I.B.4 *supra*.

evidence because the evidence on damages (like the evidence on liability) would have been harmful to them, and any attempt to prove offsets to the overcharges would have further bolstered plaintiffs' case that defendants conspired and that their conspiracy had a harmful financial impact on plaintiffs.

Having decided not to adduce any evidence of what they in fact did, defendants seek to draw insupportable inferences from the mere fact of fluctuating mill prices and from matters outside of the record. None of the evidence or matters to which defendants now point rebuts plaintiffs' *prima facie* case.

Defendants stretch reason when they claim that fluctuating mill prices rebutted the evidence that the phantom increments were profits of the conspiracy. *See* Wey. Brief at 9. Regardless of fluctuations in the mill price, the defendants set the total price of southern plywood by an agreed upon formula: they added the west coast freight to a mill price that was basically the west coast mill price. *E.g.*, PX 213 (TR 337), PX 219 (TR 1110), PX 223 (TR 832), PX 233 (JA 408, TR 1510), PX 739 (TR 2689); JA 260-61, 295-97, 323-24; TR 1110-18, 1122-24, 1994. Thus, the total price for southern plywood contained the phantom increments over and above the regular mill price. *See* TR 2962-65.[55]

Defendants also claim that the Ninth Circuit's opinion in *Boise Cascade Corp.* v. *FTC*, 637 F.2d 573 (9th Cir. 1980) (APP J), rebuts plaintiffs' case. As on the issue of conspiracy, *Boise Cascade* is irrelevant on measure of damages.[56]

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[55] Defendants also now suggest that southern producers might sometimes have had higher costs than western producers and that a cost difference could have affected the price level that would have prevailed in the absence of conspiracy. The cost issue is a red herring. Record evidence refutes defendants' allegations. *E.g.*, TR 165, 491-92, 504, 3002. In any event, defendants had the burden to prove their contention on costs (*see* note 53 *supra*) and did not do so.

[56] *See* note 7 *supra*.

Finally, the brief of defendants Weyerhaeuser and Willamette improperly refers to data taken from an affidavit of their own counsel. *See* Wey. Brief at 13. The affidavit was prepared after the trial was over, *and was never offered or admitted into evidence.* Its contents are grossly distorted and are contradicted by record evidence. *See, e.g.*, PX 64-68 (TR 1650-51), PX 69-71 (TR 2689), PX 126-140 (TR 2689), PX 589 (JA 447, TR 1961-62). Compounding this impropriety, defendants refer to the affidavit in their brief as the affidavit of their expert witness. Wey. Brief at 13 n.9. They weave matters contained in the affidavit throughout their brief, so that it is practically impossible for the reader to separate the contentions made in the affidavit from the record evidence. Defendants claim, falsely, that plaintiffs never objected in the Court of Appeals to defendants' reliance on matters in the affidavit, when in fact plaintiffs vigorously objected.[57]

E. The Trial Court's Charge and Interrogatories Were Proper

The charge and interrogatories[58] on measure of damages to the class were correct. The trial court meticulously tailored the charge and interrogatories to the evidence introduced at trial and the contentions of the parties.

Judge Pointer constructed his charge and interrogatories to present to the jury the only damage issues arising from the evidence. He asked the jury whether the defendants' pricing practices caused "financial damage" to the plaintiffs as purchasers. JA 193-94; Interrogatories 2(a) and 4(a) (APP I).[59] The jury answered

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[57] Brief for Appellees in the Fifth Circuit at 38 n.33, 73 n.58.

[58] The special verdict questions given to the jury by the trial court are referred to in the record and herein as interrogatories.

[59] The resemblance between the charge and interrogatories of Judge Pointer and the charge proposed by defendants is striking. Defendants proposed in relevant part: "Plaintiffs must also prove

[Footnote continued]

"yes." The court then asked the jury whether that "financial damage" was equal to the amount by which the west coast freight and association weight of the plywood exceeded actual freight and weight. JA 194-95; Interrogatories 2(b) and 4(b) (APP I). As the court carefully explained, plaintiffs contended that this was "the amount by which the purchasers of * * * plywood were damaged." JA 195. Plaintiffs asked the jury to answer "yes," and defendants asked the jury to answer "no." The court charged the jurors that it was for them to decide "whether the Plaintiffs are correct in their contention * * *." JA 195. The jury decided for the plaintiffs.

Defendants allege three errors in the charge and interrogatories. First, they argue that the court had the duty to instruct the jury that the legal standard for damages is the difference between the price charged and the hypothetical price that would have prevailed absent conspiracy. As we have shown, defendants misinterpret the law. *See* Section II.C. *supra.*

Second, defendants claim that the court's charge and interrogatories incorrectly failed to focus the attention of the jury on the full delivered price of the plywood to plaintiffs. In fact, the court was not required to do so. Plaintiffs made their *prima facie* case when, having proved that defendants conspired to charge fictitious freight and weight, they established that defendants did charge plaintiffs for those fictitious increments and treated those charges as profits. In any event, the whole conduct of the trial focused the jury's attention on whether defendants conspiratorially raised the price of

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[59] [Continued]

that they suffered financial injury by the alleged conspiracy to use west coast freight in the pricing of southern pine plywood" (Supplemental Instruction No. 1 (JA 155)); and "Plaintiffs must also prove that they suffered financial injury by the alleged conspiracy to use standard weights in the pricing of western fir plywood" (Supplemental Instruction No. 2 (JA 156)).

the plywood.[60] Counsel tried the case in this setting, and defendants' counsel continually emphasized to the jury that this was the question.[61] The Court of Appeals found that the question whether defendants' practices elevated the price of plywood was before the jury. APP A-12. *See also* U.S. Amicus Brief at 26.

Finally, defendants argue that it was improper for the court to give the jury Interrogatories 2(b) and 4(b) (APP I).[62] Judge Pointer asked the jury to find either that plaintiffs proved or did not prove that the class was injured by the amount of the charges for phantom freight and weight. The court's interrogatories were not only proper; the court had no other choice. The measure of damages to the class claimed by plaintiffs was the sum of the charges for phantom freight and weight. Defendants persistently argued that damages were zero. There was no basis in the record from which the jury could have found damages somewhere between the full charges for phantom freight and weight and zero, and thus there was no basis on which the court could have justified any other interrogatories.

III. THE PARTIES KNEW THAT MEASURE OF CLASS DAMAGES WAS AN ISSUE TO BE TRIED

The District Court tried all class issues together, including violation of the antitrust laws, impact on the class, and measure of class damages. The court severed

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[60] Defendants claim that the trial court's language should have been more specific in this regard. This is an objection to form, which defendants waived by failing to object to form at trial and by failing to propose either an alternative charge or an alternative interrogatory on this point. JA 205; Fed. R. Civ. P. 49, 51. *See* Hyde v. Land-of-Sky Regional Council, 572 F.2d 988, 991 (4th Cir. 1978); United States ex rel. Greenhalgh v. F.D. Rich Co., 520 F.2d 886, 890 n.4 (9th Cir. 1975).

[61] Some of the many examples of reference to full delivered price by defendants' counsel are: TR 3413, 3416, 3418, 3420, 3426, 3430.

[62] This is also an objection to form which defendants waived.

for later trial only the individual issues, including the calculation of the dollar amount of damages sustained by individual plaintiffs. At trial, defendants introduced no evidence on the measure of damages for fear of undercutting their central arguments that they had never conspired and that their pricing practices had no impact on the delivered price of plywood. Their consistent failure to introduce evidence on measure of damages was a conscious strategy. Defendants now seek to avoid the consequences of their unsuccessful trial tactics by raising a specious constitutional due process argument.[63] Defendants contend that they received no notice that the measure of class damages was an issue to be tried in the first trial of this bifurcated proceeding and that they were thereby deprived of their due process right to present evidence on the issue. As both courts below found, defendants were unequivocally advised both prior to trial and during trial that the measure of damages for the class as a whole was to be tried in the first trial. This finding is factual in nature and compelled by the record.

A. All Parties Were So Advised Prior to Trial

The trial court determined in pre-trial proceedings that the measure of damages for the class as a whole would be tried in the first stage of a bifurcated proceeding. Only the mathematical computation of individual plain-

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[63] Defendants' brief on the merits to the Fifth Circuit made passing reference to an alleged denial of due process of law. However, the defendants' Statement of the Issues in that brief made no reference to due process, to the United States Constitution, or to any Article or Amendment thereof. Defendants are therefore precluded from arguing the point to this Court as a constitutional principle. Rules 21.1(a) and 34.1(a) of the Rules of this Court. The record presents none of the exceptions to these rules. *See* Stern & Gressman, *Supreme Court Practice*, 456-61, 703-06 (5th ed. 1978), and the cases there cited. Nevertheless, we show below why the record in this case does not present a due process issue.

tiffs' damages and other non-class issues were reserved for the second stage.[64]

The issue whether the measure of damages for the class would be tried in the initial stage first arose in the context of class certification proceedings. The first class certification order, entered by Judge Cassibry, certified the class for a trial on liability only. APP D. The case was subsequently reassigned to Judge Pointer. At the insistence of defendants (*see* JA 122), Judge Pointer agreed to reconsider the class certification and reopened argument on the issue.

Judge Pointer and the attorneys for all parties repeatedly discussed the joint trial of class damages and liability.[65] In October 1976, plaintiffs' counsel suggested before the court that liability and damages could be tried in a single class proceeding. Oct. 14, 1976, Vol. 39, p. 42. In a pre-trial conference on January 26, 1977, plaintiffs' counsel refined plaintiffs' proposal. He stated that the issue of whether the class suffered damages in the amount of the freight increments could be tried in the class liability trial. Jan. 26, 1977, Vol. 40, pp. 44-45. In response, Judge Pointer noted that this proposal "would mean the only issue left is the question of individual damages * * *. Which is unique." *Id.* at 46.

From this time forward Judge Pointer consistently linked the measure of class damages with all of the other class issues. In Pre-Trial Order No. 5, issued as a result of the January 26, 1977 pre-trial conference, Judge

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[64] As discussed at pp. 3-5 *supra*, this appeal is from a jury verdict entered in the first stage of the bifurcated proceeding, in which all issues affecting the entire class were tried. Proceedings regarding the second stage, the computation of the dollar amount of the damages sustained by individual plantiffs, are now pending in the District Court.

[65] *See, e.g.*, Oct. 14, 1976, Vol. 39, pp. 42-44; Jan. 26, 1977, Vol. 40, pp. 44-46.

Pointer recertified the class to include class treatment of all issues, including "statutory violation, impact and damages." JA 122. Pre-Trial Order No. 5 reserved determination of whether damages "must be tried at one time on behalf of all class members." *Id.*, footnote.

Thereafter, the court resolved this issue in Pre-Trial Order No. 9. Consistent with the earlier discussions, Pre-Trial Order No. 9 grouped the measure of damages for the class together with all of the other class issues for trial in the first stage, reserving determination of individual damages for a subsequent trial.[66] The order states:

> *Trial and Severance.* This litigation is set for trial * * * *upon all issues except the following,* which are severed for subsequent trial as appropriate:
>
> (1) amount of damages sustained by *individual* plaintiffs, intervenors and class members * * *. [JA 127; emphasis added.]

Judge Pointer stated that Pre-Trial Order No. 9 was designed specifically to exclude from the first trial only those issues which affected individual plaintiffs. He explained that the exception for " 'amount of damages sustained by individual plaintiffs, intervenors, and class members' " was "merely intended to avoid that part of a trial which would be concerned with *details of indi-*

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[66] The defendants' assertion (Wey. Brief at 22, 62-63) that Pre-Trial Order No. 9 "reconfirmed" Judge Cassibry's original certification of the class for trial of liability issues only is incorrect. As discussed above, Judge Pointer modified Judge Cassibry's determination and certified the class for trial of all issues, including damages. The proper sequence of events in which to read Pre-Trial Order No. 9 begins with Judge Pointer's observation that class damage is a class issue while damages suffered by individuals are unique.

vidual purchases and purchasers * * *." APP C-7; emphasis added.[67]

B. All Parties Were Similarly Advised During the Trial

During the trial defendants were advised by the trial court, and alerted further by plaintiffs' counsel, that the measure of damages for the class was included in the issues being tried.

During the course of the trial Judge Pointer advised the parties that *all* issues were before the jury "other than those that related to specific dollars items for individual people, a matter that would require months of discovery to be completed." JA 235. Prior to the close of defendants' case, Judge Pointer apprised defense counsel of his proposed interrogatories regarding measure of damages. JA 235-36.[68]

Counsel for plaintiffs also made clear to defense counsel during trial that plaintiffs were trying the measure of damages for the class. In a brief circulated to all other parties and the court on October 30, 1978, prior to the conclusion of plaintiffs' case, counsel for plaintiffs stated that they had proved that the measure of class damages was the freight gain and the gain from the under-

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[67] In fact, Pre-Trial Order No. 9 severed for later trial all individual issues. Individual plaintiffs' claims that the statute of limitations was tolled were therefore also severed for later determination. JA 127.

[68] Defendants contend that they were not apprised of the measure of damage interrogatories until November 10, 1978, "after all evidence had been presented." G-P Brief at 16 n.10. In fact, on November 8, while defendants were still introducing evidence, defendants submitted their Proposed Instruction No. 91, which suggested instructions with respect to the "verdict forms" containing the measure of damages interrogatories. JA 154. On that date the interrogatories were discussed at a conference of the court and all counsel, which is referred to at TR 3146-47.

weights.[69] Plaintiffs introduced ample evidence in support of this measure of class damages. *See* discussion at Section II.B. *supra.*

Judge Pointer held that any misunderstanding as to the scope of the first trial was unjustifiable. He remarked, "even if I credited [the] statements that [defendants' counsel] were not aware" that measure of damages was being tried, "the Defendants *should have been aware of that.*" JA 236; emphasis added. He added, "Defendants are in error and cannot take advantage of their claimed surprise in this point * * *[T]he matter was clear * * *." JA 237. When read in context, Judge Pointer's reference to the "sincerity of defense counsel in perhaps equating" the terms "measure of impact or damage" and "amount of damages by individual plaintiffs" in no way suggested that the defendants' mistake was reasonable or excusable. JA 237.[70] The Court of Appeals sustained this finding. APP A.

C. Defendants Knew or Should Have Known that All Class Issues Were to Be Tried Together

Both courts below found that the measure of damages to the class was properly tried in the first stage of this proceeding. APP A-11, 12; APP C-6, 7. Trial of the

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[69] *See* JA 235; TR 2306-07, 2580-81.

[70] Judge Pointer stated in full:

> Defense counsel began argument on this motion this afternoon by saying that what the Court had told the jury was that it was not going to be deciding the question as to the measure of impact or damage. And, yet, when we go to the words of the Court, that is not what the Court said. It, rather, instructed the jury that they were not going to be deciding the amount of damages by individual plaintiffs.
>
> It may very well be and the Court has no reason to doubt sincerity of defense counsel in perhaps equating those two terms. The Court's view is that those two terms are not identical. They are not identical semantically, and they are not identical in the eyes of the law. [JA 237.]

measure of damages to the class in the second stage would have required reconsideration of issues decided in the first trial. Reconsideration in a second trial of issues already tried is fundamentally unfair and infringes rights guaranteed by the Seventh Amendment to the United States Constitution. *Alabama* v. *Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978); *see Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494, 500 (1931).

In this case, the determination of impact and the determination of measure of damages to the class necessarily required consideration of common issues of fact. Accordingly, Judge Pointer specified for later trial only the mathematical computation of individual plaintiffs' damages. He concluded: "The type of second trial envisioned by the defendants is the kind condemned in *Blue Bird* and deliberately avoided by this court in pre-trial proceedings." APP C-6.[71]

D. Defendants Have Waived Any Right to Object to Inclusion of the Measure of Class Damages in the First Trial

At every step of the proceedings defendants had the opportunity to introduce evidence on measure of damages. Prior to trial defendants "had ample time to determine the boundaries of the bifurcation order," yet they failed to object or to seek clarification of that order. *See Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307, 1324 (5th Cir. 1976). Failure to object to the

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[71] Faced with the same situation in other class actions charging price fixing conspiracies, courts not infrequently order trial of the measure of class damages with other class issues and sever for later determination only the arithmetical calculation of individual plaintiffs' damages. *See, e.g.*, In re Corrugated Container Litigation, 1980-81 Trade Cas. (CCH) ¶ 63,669 (S.D. Tex. 1980); Dennis v. Saks & Co., 1975-2 Trade Cas. (CCH) ¶ 60,396 at 66,749 (S.D.N.Y. 1975); *cf.* In re Independent Gasoline Antitrust Litigation, 79 F.R.D. 552, 561-62 (D. Md. 1978).

bifurcation order is alone sufficient to waive defendants' right to object to the nature of the bifurcation. *Id.*

Even if defendants had originally misconstrued the bifurcation order, during the trial it was unmistakably clear that measure of damages was an issue before the jury. Yet defendants introduced no evidence on this point. Finally, when on November 8, 1978, the measure of damage interrogatories were discussed by the court with all parties, defendants failed to introduce evidence or request leave to introduce evidence on the measure of damages. Defendants admit that whatever evidence they may now have was available to them at that time. *See* Brief of Defendants-Appellants in the Fifth Circuit at 75, footnote.

Defendants purposely defaulted on the measure of class damages issue because their conspiracy did hurt its victims and a focus on damages would have confirmed both the conspiracy and the measure of damages sustained by the plaintiffs. Defendants' hope was to convince the jury that they never conspired. Failing that, they would try to convince the court that they never realized that measure of damages was an issue to be tried. The Fifth Circuit discerned defendants' plan: "Having failed to persuade the first jury that their challenged practices caused damage to no one, defendants now seek the opportunity to convince a different jury that some other measure of damages is appropriate." APP A-11. This is exactly what defendants propose to do, and exactly what the law forbids.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully submit that the judgments below should be affirmed.

Respectfully submitted,

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APPENDIX A

Plaintiffs' Exhibit 53 (TR 690, 693)

Georgia-Pacific proposal for second plywood plant at Crossett, Arkansas, including pro forma annual profit & loss statement (reflecting "Freight Advantage")

CROSSETT, ARKANSAS
SECOND PLYWOOD PLANT

GEORGIA-PACIFIC CORPORATION
SECOND PLYWOOD PLANT—
CROSSETT, ARKANSAS

GENERAL COMMENTS

This is a proposal to construct a second plant at Crossett, Arkansas to manufacture pine plywood. The plant will peel approximately 40,000 M board feet of logs per year and produce approximately 130,000 MSF (3/8 measure) of plywood. We anticipate a production mix of 50% sanded and 50% sheathing panels.

Another plywood plant at Crossett makes economic sense. This project will convert 40,000 M feet of logs into plywood at a profit before taxes of approximately $80.00 per M log scale compared to converting the same logs into lumber at a profit before taxes of approximately $9.00 per M board feet. The plant is estimated to cost $4.7 million.

Calculations included in the pro forma contemplate a sanded plywood list price of $64 and a 5/8" sheathing price of $89. Any variation in these prices under actual conditions would have an effect on the operating results. On the other hand, with the presence of skillful marketing methods, it is probable that the sales average can be improved over those included in the pro forma figures. Regardless of the potential variation, however, we consider the accompanying figures to be realistic.

From the standpoint of the market, contemplated annual production represents only slightly in excess of 1 per cent of the industry total expected at the time production begins. We must recognize that the growth of the industry has been approximately 10% compounded annually from 1946 through 1963. With this in mind, it becomes evident that the production contemplated in this proposed Crossett operation adds no more to the available supply than about 10 per cent of the normal annual

growth in the industry. Since no let-up is in sight and since the market research people have projected a long-range substantial growth in the industry, there would seem to be no problem from this standpoint.

GEORGIA-PACIFIC CORPORATION
SECOND PLYWOOD PLANT—CROSSETT, ARKANSAS

PRO FORMA ANNUAL PROFIT & LOSS STATEMENT

	M Ft.	Amount	Average
Gross Sales	130,000	$8,320,000	$64.00
Freight Advantage	"	1,235,000	9.50
Discounts & Allowances	"	(585,000)	(4.50)
Net Sales	130,000	$8,970,000	$69.00
Costs & Expenses			
Wood Cost	130,000	$2,205,000	$16.95
Green Veneer Manufacturing	"	845,000	6.50
Dry Veneer Processing	"	845,000	6.50
Glue	"	700,000	5.40
Gluing, Pressing and Sawing	"	715,000	5.50
Sanding and Patching	"	390,000	3.00
Administrative	"	260,000	2.00
Total Costs & Expenses	130,000	$5,960,000	$45.85
Operating Profit	130,000	$3,010,000	$23.15
Chip Income	"	225,000	1.75
Net Profit Before Taxes	130,000	$3,235,000	$24.90
Income Taxes	"	(1,550,000)	(11.95)
Net Profit	130,000	$1,685,000	$12.95
Recovery			3.25 to 1
Log Usage			40,000 M'

Note 1: This plant is anticipated to be in operation in February 1963.

Note 2: Sales are based on 50% sanded and 50% sheathing using a $64.00 sanded plywood list and an $89.00 sheathing list.

Note 3: Profit based on one year operations after a break-in period of 6 months.

APPENDIX B

Plaintiffs' Exhibit 325 (TR 1802)

U.S. Plywood—Champion Papers, Inc. manufacturing department profit & loss statement (reflecting "Freight Pickup")

U.S. Plywood - Champion Papers Inc.

CURRENT MONTH			LINE	CHESAPEAKE PLYWOOD	YEAR TO DATE			QUARTER TO DATE		
M FIG.	AMOUNT	PER M	NO.		M FIG.	AMOUNT	PER M	M FIG.	AMOUNT	PER M
			1							
			2	SALES-INTER DEPT						
3,419	246,829-	72.19-	3	-INTER DIV	54,950	3,831,116-	69.72-	11,978	852,575-	71.18-
3,457	63,035-	18.23-	4	-FREIGHT PICKUP	55,354	985,080-	17.80-	12,108	218,992-	18.09-
38	3,326-	87.53-	5	-OUTSIDE	404	35,268-	87.30-	130	11,335-	87.19-
3,457	313,190-	90.60-	6	TOTAL NET SALES	55,354	4,851,464-	87.64-	12,108	1,082,902-	89.44-
549	141,702	55.59	7	DIRECT MATERIALS U-4	55,755	2,666,438	47.82	12,278	619,605	50.46
2,549	39,371	15.45	8	DIRECT LABOR U-5	55,755	640,980	11.50	12,278	147,721	12.03
2,549	70,632	27.71	9	MANUFACTURING EXP U-6	55,755	1,087,151	19.50	12,278	247,663	20.17
2,549	34,861-	13.68-	10	BY-PRODUCT SALES U-7	55,755	618,567-	11.09-	12,278	149,513-	12.18-
			11							
			12							
2,549	216,843	85.07	13	TOTAL COST OF GOODS MFG	55,755	3,776,002	67.72	12,278	865,477	70.49
1,441	96,100	66.69	14	BEGIN INVENTORY	142	9,318	65.62	365	24,586	67.36
			15	GOODS PURCH FOR RESAL						
9-	484-	53.78	16	MILL USE	19-	1,058-	55.68	11-	543-	49.36
3,981	312,459	78.49	17	NET AVAILABLE	55,878	3,784,262	67.72	12,632	889,520	70.42
524	36,937	70.49	18	ENDING INVENTORY	524	36,937	70.49	524	36,937	70.49
524			19	MKT VALUE DECLINE	524			524		
3,457	275,522	79.70	20	TOTAL COST OF SALES	55,354	3,747,325	67.70	12,108	852,583	70.41
3,457	37,668-	10.90-	21	GROSS PROFIT	55,354	1,104,139-	19.95-	12,108	230,319-	19.02-
3,457	2,026	.59	22	SHIPPING EXP U-8	55,354	26,652	.48	12,108	6,770	.56
3,457	1,417	.41	23	SELLING EXP U-8	55,354	21,722	.39	12,108	4,939	.41
3,457	14,338	4.15	24	G & A EXP U-9	55,354	129,722	2.34	12,108	35,619	2.94
3,457			25	R & D EXP	55,354			12,108		
3,457	17,781	5.14	26	TOTAL OPERATING EXPENSES	55,354	178,096	3.22	12,108	47,328	3.91
			27							
3,457	19,887-	5.75-	28	OPERATING PROFIT	55,354	926,043-	16.73-	12,108	182,991-	15.11-
3,457	5,575-	1.61-	29	INTEREST INCOME	55,354	56,536-	1.02-	12,108	16,446-	1.36-
3,457			30	P/L ON SALES OF ASSET	55,354	41,182	.74	12,108	37,432	3.09
3,457			31	MISC INCOME	55,354	126-		12,108	104-	.01-
3,457	5,575-	1.61-	32	TOTAL OTHER INCOME	55,354	15,480-	.28-	12,108	20,880	1.72
3,457	7,223	2.09	33	INTEREST EXPENSE	55,354	93,417	1.69	12,108	22,602	1.87
3,457	8		34	MISC EXPENSE	55,354	195,734	3.54	12,108	195,670	16.16
3,457	7,231	2.09	35	TOTAL OTHER EXPENSES	55,354	289,151	5.22	12,108	218,272	18.03
			36							
3,457	18,231-	5.27-	37	PROFIT BEFORE TAXES	55,354	652,372-	11.79-	12,108	56,161	4.64

APPENDIX C

Plaintiffs' Exhibit 589 (TR 1961-62)

Page 30 of December 1, 1973 Georgia-Pacific invoice register for mill #031 Russellville (reflecting "Freight Gain")

12 01 73 (IVO902-01) PLYWOOD INVOICE REGISTER FOR MILL # 031 RUSSELLVILLE 030

MILL	INV. NO.	INV. DATE	ORDER NO.	CUST. NO.	SURFACE MEASURE	CONVERTED MEASURE	GROSS AMOUNT	FREIGHT ALLOWED	PREPAID FREIGHT	FREIGHT ADJUST.	FREIGHT AFTER ADJ	CASH DISC	MILL NET	INVOICE NET
031	6437	111273	31146	961200	50.688	101.376	10,567.63	500.68	.00	.00	1,946.54	201.33	8,120.41	10,066.95
031	6448	111273	31465	961100	23.744	39.573	4,069.01	.00	269.67	.00	670.59	75.98	3,128.75	4,069.01
031	6338	111273	31465	961100	23.744	39.573	4,069.01	.00	173.69	.00	766.57	77.90	3,128.75	4,069.01
031	6349	111273	31465	961100	23.744	39.573	4,069.01	.00	173.69	.00	766.57	77.90	3,128.75	4,069.01
031	6347	111273	31465	961100	23.744-	39.573-	4,069.01-	.00	173.69-	.00	766.57-	77.90-	3,128.75-	4,069.01-
031	6355	110973	31472	961401	29.568	59.424	3,166.73	.00	186.69	.00	793.71	59.60	2,188.33	3,166.73
031	6360	110973	31472	961401	81.356	101.780	9,713.43	537.37	.00	.00	1,847.48	183.52	7,320.55	9,176.03
031	6363	111273	31482	962201	81.356	101.452	10,388.05	.00	731.23	.00	1,754.06	193.13	7,902.70	10,388.04
031	6367	111273	31482	962201	80.100	101.452	10,062.05	.00	761.68	.00	1,705.18	186.00	7,595.19	10,062.05
031	6391	111273	31482	962201	66.544	101.368	10,062.05	.00	174.07	.00	772.73	109.65	4,709.79	9,656.39
031	6328	111273	31456	962201	21.440	43.061	5,059.39	.00	90.11	.00	715.83	59.86	2,277.59	3,083.53
031	6329	111273	31442	962200	20.352	33.920	3,083.53	.00	185.62	.00	841.05	80.01	3,159.86	4,186.53
031	6330	111273	31458	962200	28.696	42.293	4,186.53	.00	.00	.00	1,469.85	169.37	6,999.00	8,468.85
031	6336	111273	31957	962100	50.688	101.376	9,446.22	977.37	.00	.00	1,467.47	172.32	7,001.53	8,616.35
031	6340	111273	31957	962100	50.688	101.376	9,593.72	977.37	.00	.00	1,469.85	169.37	6,999.00	8,468.85
031	6341	111273	31957	962100	20.688-	101.376-	9,446.22-	977.37-	.00	.00	1,467.47-	172.32-	7,001.53-	8,616.35-
031	6350	111273	31958	962401	24.656	39.459	4,644.68	.00	218.94	.00	740.35	68.51	2,685.15	3,644.48
031	6360	111273	31972	962400	101.376	101.376	10,159.90	279.61	.00	.00	2,194.98	197.60	7,635.31	9,880.29
031	6362	111273	31973	961403	64.656	101.443	9,898.27	.00	.00	.00	2,272.21	197.96	7,625.86	9,898.07
031	6365	111273	32024	962100	72.664	97.152	9,645.01	240.29	.00	.00	2,170.81	188.09	7,233.94	9,404.75
031	6366	111273	32025	962100	70.332	101.376	10,064.36	248.55	.00	.00	2,267.35	196.31	7,548.46	9,815.81
031	6368	111273	32025	962100	72.664	97.152	9,645.01	240.26	.00	.00	2,170.81	188.09	7,233.94	9,404.75
031	6369	111273	32025	962100	70.332	101.376	10,064.36	248.55	.00	.00	2,267.35	196.31	7,548.46	9,815.81
031	6370	111273	32026	962400	70.332	101.376	10,064.36	275.61	.00	.00	2,236.29	195.69	7,548.46	9,784.75
031	6371	111273	32027	962400	70.332	101.376	10,064.36	279.61	.00	.00	2,236.29	195.69	7,548.46	9,784.75
031	6372	111273	32028	962400	70.332	101.376	10,064.36	279.61	.00	.00	2,236.29	195.69	7,548.46	9,784.75
031	6373	111273	32029	962400	70.332	101.376	10,064.36	684.90	.00	.00	1,827.50	187.50	7,548.46	9,375.46
031	6374	111273	32030	962400	70.332	101.376	10,064.36	684.90	.00	.00	1,827.50	187.50	7,548.46	9,375.46
031	6375	111273	32030	962900	71.406	95.744	9,502.22	659.63	.00	.00	1,716.49	176.91	7,129.10	8,845.59
031	6376	111273	32030	962900	72.772	110.491	11,481.29	301.25	.00	.00	1,692.46	213.59	8,987.37	10,679.83
031	6377	111273	32030	962900	60.112	90.112	9,079.20	237.59	.00	.00	1,962.09	136.83	6,879.56	8,841.65
031	6378	111273	32030	962900	30.048	101.376	10,113.72	953.66	.00	.00	1,493.59	183.20	7,666.51	9,160.10
031	6379	111273	32030	962900	50.101-	100.202-	10,036.34-	953.66-	.00	.00	1,465.23-	181.11-	7,593.45-	9,059.68
031	6380	111273	32030	962900	50.101	120.242	12,036.35	262.44	.00	.00	2,155.38	234.87	9,568.23	11,743.61
031	6381	111273	32030	962900	61.356	122.712	12,278.11	.00	173.03	.00	778.97	76.06	3,224.41	3,676.11
031	6382	111273	32030	962900	19.714	39.428	3,978.14	337.70	.00	.00	2,020.12	205.71	8,265.76	10,245.88
031	6383	111273	32030	962900	81.036	101.780	10,033.58	477.27	.00	.00	1,359.95	194.64	7,777.06	9,741.01
031	6384	111273	32030	962900	80.880	101.376	10,229.29	244.05	.00	.00	2,271.85	216.58	8,577.17	10,849.02
031	6385	111273	32030	962900	70.332	101.376	10,063.37	244.05	.00	.00	2,271.85	216.98	8,577.17	10,849.02
031	6386	111273	32030	962900	70.332	101.376	10,063.37	244.05	.00	.00	2,271.85	216.98	8,577.17	10,849.02
031	6387	111273	32030	962900	70.332	101.376	10,063.37	244.05	.00	.00	2,271.85	216.98	8,577.17	10,849.02
031	6388	111273	32030	962900	70.332	101.376	10,063.37	261.61	.00	.00	2,254.29	216.62	8,577.17	10,831.46
031	6389	111273	32030	963000	70.332	101.376	10,063.37	261.61	.00	.00	2,254.29	216.62	8,577.17	10,831.46
031	6390	111273	32030	963000	70.332	101.376	10,063.37	261.61	.00	.00	2,254.29	216.62	8,577.17	10,831.46
031	6392	111273	32030	963000	70.332	101.376	10,063.37	261.61	.00	.00	2,254.29	216.62	8,577.17	10,831.46
031	6393	111273	32030	963000	70.332	101.376	10,063.37	261.61	.00	.00	2,254.29	216.62	8,577.17	10,831.46
031	6394	111273	32511	962800	71.000	95.744	10,479.79	381.37	.00	.00	1,994.76	201.90	8,100.66	10,295.42
031	6395	111273	32513	961200	61.356	101.780	10,652.64	531.37	.00	.00	1,847.48	202.20	8,265.76	10,113.24
031	6396	111273	32514	961400	26.268	39.424	4,313.57	.00	134.73	.00	873.67	84.18	3,335.57	4,313.97
031	6397	112073	32515	961400	29.503	39.424	4,313.97	.00	134.73	.00	873.67	84.18	3,335.57	4,313.97
031	6398	111273	32516	961400	29.503	39.424	4,237.39	.00	.00	.00	901.82	84.74	3,335.57	4,237.39
031	6399	111273	32517	961400	29.503	39.424	4,237.39	.00	.00	.00	901.82	84.74	3,335.57	4,237.39
031	6400	111273	32518	961400	29.503	39.424	4,313.97	.00	134.73	.00	873.67	84.18	3,335.57	4,313.97
031	6401	111273	32519	961400	29.503	39.424	4,237.39	.00	.00	.00	901.82	84.74	3,335.57	4,237.39
031	6402	111273	32520	961400	29.503	39.424	4,267.29	.00	.00	.00	887.04	85.34	3,380.21	4,267.25
031	6403	111273	32521	961400	29.503	39.424	4,342.55	.00	134.73	.00	857.61	84.75	3,380.21	4,342.55
031	6404	111273	32522	961400	29.503	39.424	4,342.55	.00	134.73	.00	857.61	84.75	3,380.21	4,342.55
031	6405	111273	32523	961300	101.376	101.376	11,120.95	500.68	.00	.00	1,928.29	212.40	8,691.98	10,620.27
031	6406	111273	32524	961300	29.424	39.424	4,566.36	.00	163.48	.00	793.86	87.03	3,550.02	4,520.16
031	6407	111273	32538	961300	101.376	101.376	11,508.71	.00	1,065.62	.00	1,378.76	208.86	8,891.90	11,508.71
031	6408	112073	32603	962000	50.688	101.376	11,100.57	261.61	.00	.00	2,212.98	218.09	8,691.98	10,904.96
031	6409	111273	32614	962500	101.376	101.376	10,452.68	724.90	.00	.00	1,722.32	154.55	8,005.66	9,727.98
031	6410	112073	32638	962000	20.688	101.376	9,492.85	375.95	.00	.00	2,026.16	182.33	7,090.74	9,116.90
031	6411	112073	32640	962000	20.688	101.376	9,492.85	375.95	.00	.00	2,026.16	182.33	7,090.74	9,116.90
031	6412	112073	32640	970000	50.688	101.376	9,492.85	375.95	.00	.00	1,528.91	175.14	7,229.17	8,753.08
031	6413	112073	32674	967400	50.688	101.376	9,675.33	518.24	.00	.00	1,722.32	210.46	8,300.99	10,523.30
031	6414	111573	32663	962500	50.688	101.376	11,248.52	724.90	.00	.00	1,614.46	197.60	9,265.76	9,880.16
031	6415	112073	32665	962500	50.688	101.376	10,883.83	803.42	.00	.00	1,614.46	197.60	9,265.76	9,880.16
031	6416	112073	32665	970300	61.050	101.703	11,234.55	502.10	.00	.00	1,915.71	214.64	8,816.49	10,732.20
031	6417	112073	32665	963100	16.712	34.424	3,353.41	.00	177.59	.00	774.11	63.51	2,401.71	3,353.41
031	6418	111673	32708	966700	50.688	101.376	10,703.96	1,071.91	.00	.00	1,375.81	192.64	8,256.62	9,639.43
031	6419	111673	32708	966700	50.688	101.376	10,773.23	.00	593.66	.00	1,493.54	196.39	8,326.01	10,773.23
031	6420	111473	32610	966100	50.688	101.376	10,773.23	.00	.00	.00	874.04	89.54	3,602.57	4,477.19
031	6421	112773	32591	961400	29.568	39.424	4,477.19	.00	.00	.00	1,940.54	199.04	8,005.66	9,945.20
031	6422	112673	32546	971100	50.644	101.376	10,452.68	502.08	.00	.00	1,915.71	214.64	8,816.49	10,732.20
031	6423	112673	32546	961200	61.050	101.703	11,234.55	502.10	.00	.00	1,915.71	214.64	8,816.49	10,732.20

Petitioner's Reply Brief

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In The

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October Term, 1982

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vs.

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GEORGIA-PACIFIC CORPORATION, *Petitioner,*

vs.

LYMAN LAMB COMPANY, et al., *Respondents.*

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONERS WEYERHAEUSER COMPANY AND WILLAMETTE INDUSTRIES, INC.

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On Writ of Certiorari to the
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REPLY BRIEF OF PETITIONERS WEYERHAEUSER COMPANY AND WILLAMETTE INDUSTRIES, INC.

Respondents' answer to the pivotal antitrust conspiracy and damage questions on which this Court granted certiorari is to deny their existence: "No novel or substantial issue of law is presented." (Resp. Br. 3) To elude these questions, however, respondents have been forced to refashion for this Court a case that was neither tried nor submitted to the jury.

Respondents now claim their "case was not tried on a parallel action theory," and that the question of what inferences can properly be drawn from petitioners' common methods of quoting freight and their opportunity contacts is a "straw man." (*Id.* at 8) Respondents recast their case as one to fix "the delivered price of plywood," and assert it was established by "direct proof of agreement." (*Id.*) These claims do not square with the record.

Respondents' trial counsel made no charge of a conspiracy to fix delivered prices in their opening statement or closing argument, stressing instead "that the case can be quite sim-

ply stated" as a conspiracy *"to fix certain elements of price."* (Tr. 3,233-34; Tr. 78-80, 87-88)[1] The only conspiracy put to or found by the jury was limited to: "Was *the use of 'West Coast freight'* in the pricing of Southern pine plywood" and *"the use of 'standard weights'* in the pricing of Western fir plywood" the "result of a conspiracy between two or more manufacturers of softwood plywood?" (Special Verdict, Pet. App. I-1, I-2)

Consequently, this Court should not be misled by respondents' false picture of a far-ranging conspiracy to "raise and stabilize" delivered prices, with Weyerhaeuser's Mr. Tweedie at the hub of supposedly rampant collusion over "transfer pricing," "contract sales prices," and "production capacity." (Resp. Br. 11, 13 n.11) If there were really "direct proof" at trial to substantiate these claims—rather than inflated appellate rhetoric—respondents surely would have requested the jury to find a delivered price conspiracy. They did not, knowing the evidence would not support it.

This is not a matter on which this Court need search the record or substitute its judgment for that of the jury. There was simply no dispute below: mill and delivered prices were at all times highly volatile, changing daily in response to shifting supply and demand conditions and the intense competition of scores of sellers. (Wey/Wil. Br. 9-15) The chart at J.A. p. 469 showing southern plywood prices during 1969 is representative. (DX 263 (Tr. 3133)) Prices for ½" 3-ply sheathing started the year at $126, dropped to $122 by late January, recovered to $126 in February, and then fell precipitously to $78 by mid-April. After a brief rise to $96 at the end of April, prices fluctuated between $65 and $83 during the Summer and Fall, before dropping to $67 at year-end. Just as the Ninth Circuit found in the companion FTC proceeding, there was "no evidence in the record suggesting that the price of plywood has been unresponsive to market conditions." (637 F.2d at 577; Pet. J.A., J-9)

[1] Except where otherwise stated, emphasis has been added.

Once attention is turned from respondents' spurious delivered price conspiracy to the conspiracies actually at issue, the crucial legal errors below are exposed. Because there was no "direct proof of agreement" on quoting West Coast freight or standard weights, the correct rule is that petitioners' parallel methods of quotation, and their alleged opportunities to collude on those practices, could be taken as circumstantial evidence of conspiracy only if the practices were inconsistent with petitioners' individual self interest. The jury was never instructed on this crucial principle, and neither the trial court nor the Fifth Circuit applied it in their review of the evidence.

Having mischaracterized the scope of the alleged conspiracies when arguing liability, respondents reverse their field on measure of damages. They assert that the proper measure should look only to the freight and weight elements of the plywood price. The law is to the contrary. The jury should have been directed to address the effect of the challenged practices on the total price and the sufficiency of the evidence should have been assessed in this light. Again, neither the trial court nor the Fifth Circuit applied the required legal standard.

I. The Jury Inferred Conspiracy On Erroneous Instructions And Legally Insufficient Evidence.

Respondents' "direct evidence" case dissolves as soon as attention is directed to the only two conspiracies found by the jury. The bulk of respondents' citations have nothing to do with those conspiracies, and the scattered inter-company discussions that concern West Coast freight or standard weights reveal only an opportunity for agreement, no proof of actual collusion. Consequently, the decisive issue is whether the courts below, in the instructions and the review of the evidence, adopted the proper legal standard for inferring conspiracy from such opportunity contacts and petitioners' parallel methods of quoting freight. They did not.

A. Respondents have mischaracterized this as a "direct evidence" case.

As a starting point, there is no evidence that most of the 30 "co-conspirators" even discussed, much less agreed upon, the use of West Coast freight or standard weights. Seven of these firms are never mentioned in *any* of the documents or testimony cited by respondents as evidencing some inter-company discussions.[2] (Resp. Br. 32-33 nn.36, 37) As for the remaining 23, respondents take remarkable liberties in asserting that their evidence showed anything beyond discussions affording an opportunity for collusion. For example, St. Regis Paper is branded a conspirator because one of its employees was taken to dinner by a Willamette official. (Tr. 1761) Bohemia Inc. is claimed to be a conspirator because the same Willamette official bought one of its employees a drink. (PX 924 (Tr. 1746)) Tremont Lumber Co. is included because of a plant visit by a Weyerhaeuser employee (Tr. 385) and the innocuous report that "[s]aw texture designer machines are on order at Tremont." (PX 192 (Tr. 1495, 1500))

For good reason the trial judge concluded that the inclusion of the 30 "co-conspirators" posed a "difficult problem." (Pet. J.A., C-3) In stark contrast to respondents' claim of "direct evidence" linking these producers to the conspiracy, the trial judge found only proof of parallel conduct "to the effect that the challenged practices were industry-wide in scope and were employed by all manufacturers." (*Id.*)

Respondents' "direct evidence" allegedly tying the three petitioners to the conspiracies is similarly ephemeral. *Not one of the 19 exhibits cited by respondents as reflecting inter-company discussions on "competitively significant subjects" even mentions the subject of standard weights!* (Resp. Br. 11-18) In fact, the lone discussion of weights cited by respondents is the following testimony of a Willamette officer, repeated as to four producers:

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[2] American Can Co., Columbia Plywood Corp., Louisiana Plywood Corp., Pacific Lumber Co., Plum Creek Lumber Co., Pope & Talbot, Inc., and Rosboro Lumber Co.

"Q. Have you ever had a discussion with any representative of [the producer] covering the subject of underweights?

"A. I don't recall having had.

"Q. You may have?

"A. May have." (Tr. 1720, cited at Resp. Br. 16; see also Tr. 1721)[3]

The cited evidence of inter-company communications concerning the use of West Coast freight is slightly more expansive, but also contains no "direct evidence" of agreement. Only one exhibit mentions West Coast freight by name. (PX 174, J.A. p. 398 (Tr. 346-47)) In that exhibit, quoted in full in petitioners' prior brief (p. 39), a Weyerhaeuser representative reported to Mr. Tweedie that he had learned a local Georgia-Pacific mill was quoting on the basis of "low Crow's less 5% less 3% plus West Coast freight." No amount of innuendo can turn this innocent internal report on the price that Georgia-Pacific *had already adopted* into "direct evidence" of collusion.

Nor is there any merit to the claim that Mr. Tweedie "had *no legitimate purpose* for assembling this information. . . ." (Resp. Br. 15; emphasis in original) Mr. Tweedie's job as Softwood Plywood Product Manager included the development of accurate market data for the company's product planning. (Tr. 311) Respondents' argument is as absurd as saying that Ford's product planning group could have no legitimate interest in knowing the price of Hondas.

Respondents fare no better with their discussion of four other exhibits that refer to "freight return" or "FOB pricing." Not one contains direct proof of an agreement by any petitioner to use West Coast freight.

PX 10. Rather than agreement, this exhibit actually records that Weyerhaeuser was experimenting with a different method of quoting freight. (Resp. 17-18; U.S.

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[3] Respondents cite other evidence establishing that standard weights were prevalent in the quotation of plywood prices (Resp. Br. 21-22), but this showed nothing more than parallel conduct.

Br. 17) There is no significance that Georgia-Pacific may have gained this information by calling a Weyerhaeuser plant. Plywood sales were routinely made among producers as well as to third-party customers, and prices and terms were freely and openly quoted to all potential purchasers. The virtually instantaneous access to such information by all buyers contributed to the intense competition that saw prices fluctuate so rapidly that weekly price lists were "no good generally five minutes after they are printed." (Tr. 274, 1076-78)

PX 182. It is a measure of respondents' strained reading of the record that they cite this Weyerhaeuser memorandum as a prime example of a "discussion of pricing policy," when it merely reports that Georgia-Pacific was pricing "*on lowest market level.*" (Resp. Br. 14 & n.12) Respondents also rely on the memorandum's two-sentence report that Georgia-Pacific's southern mills had received requests to ship into New England, "but due to freight return resist all possible." (J.A., p. 407) This proves neither a West Coast freight conspiracy nor the "geographical marketing restrictions by which they implemented that system." (Resp. Br. 14) Any seller quoting delivered prices will "resist" sales to areas where its "freight return" is less attractive.

PX 342. Respondents only cite in passing this internal U.S. Plywood memorandum, but the government finds troubling its report that, "We have just been advised by [Georgia-Pacific] that they intend to begin testing FOB mill pricing at their southern plants this week." (U.S. Br. 17) The government overlooks the author's testimony that he was "advised" of the change during routine negotiations over the purchase of plywood, when Georgia-Pacific "quoted us an F.O.B. mill price." (Tr. 1884, 1905-06) The government also asserts that, "He [Wescott] promised to keep 'close tabs' on this disturbing development 'since we will be in the same boat before too long.'" Nothing in the

memorandum or the record states Wescott viewed this as a "disturbing development." Indeed, he stated on deposition he wanted to keep "close tabs" simply because U.S. Plywood was "very close to signing a consent decree" with the FTC that would have required it to switch to f.o.b. mill pricing. (Wescott Dep. 282-83, excluded Tr. 1906-07)

PX 377. Respondents lay special emphasis on this U.S. Plywood proposal to purchase plywood from Kirby Lumber, which states that "[o]ne of our principal objectives in trying to line up outside production is to do everything possible to stabilize prices," and that Kirby would be guaranteed "an average freight pickup of at least 70¢." (J.A. p. 422, cited at Resp. Br. 8, 12, 18) Respondents fail to disclose that the letter was sent in mid-1965, nearly two and a half years before the conspiracy period found by the jury. No evidence is (or could be) cited tying the alleged "intent to stabilize" to the conspiracy period or to petitioners, who never saw the document until this litigation. And, as noted, respondents did not submit a charge of industry-wide price stabilization to the jury, knowing it was unsupported by the record.[4]

This, then, is the sum total of the "direct evidence" marshalled by respondents (or referred to by the government) bearing on a West Coast freight or standard weight conspiracy—an inconclusive snatch of testimony and a handful of documents that scarcely rise to the level of "opportunity contacts." Lacking evidence of their own, respondents advance the specious claim that "not a single officer or employee of any defendant took the stand to explain his actions," and that this should be taken as "persuasive evidence of conspiracy" under *Interstate Circuit, Inc.* v. *United States*,

[4] In addition to the inter-company communications discussed above, respondents cite several inter-company purchase and sale contracts. (Resp. Br. 12 n.9, 3 n.10) Respondents' contention that these legitimate contracts are evidence of collusion is factitious.

306 U.S. 208, 225-226 (1939). (Resp. Br. 28-29) This ignores what happened at trial.

This case was tried by both sides primarily on the basis of deposition readings; the only live witnesses were experts. Under the trial court's procedures, if respondents designated any testimony from petitioners' officers or employees, petitioners' designations were read at the same time. (Tr. 212-13, 1787) Consequently, the explanatory testimony contemplated by *Interstate Circuit* came in during respondents' case. Over a quarter of the readings during respondents' case-in-chief were designated by petitioners, and the jury heard from 15 past or present high ranking officials of petitioners, and another 11 of other producers.[5] In fact, *the only parties for whom no officer or employee testified were respondents.*

B. The jury instructions were legally deficient.

Since there was no direct evidence of collusion on freight or weights, the validity of the conspiracy verdict turns on whether an *inference* of collusion could properly be drawn from the circumstantial evidence of parallel behavior and opportunity contacts, read in light of the industry's economic setting. The proper rule, as the United States urges, is that, "The jury should be instructed that such behavior, whether viewed by itself or in conjunction with other evidence, supports an inference of agreement *only if the jury finds that the behavior is inconsistent with individual self-interest* and thus unlikely to occur without collusion." (U.S. Br. 10-11)[6] This rule has been adopted by the Second, Third, Seventh, Eighth,

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[5] Tr. 187-300, 303-71, 385-91, 419-51, 453-538, 540-694, 717-850, 883-972, 979-1081, 1091-1213, 1238-1485, 1510-1635, 1642-1770, 1775-1936, 1939-2036, 2046-2181, 2193-2295, 2476-2510, 2523-74, 2632-56.

[6] The government notes that "evidence showing mere 'opportunities' to conspire (*i.e.*, contacts providing a potential occasion for collusion) is not probative," since "[m]any businessmen function in an environment in which meetings, trade association gatherings, and social activities bring them into contact with competitors. To base a finding of collusion on this kind of evidence would condemn the innocent along with the guilty. . . ." (*Id.* at 7-8 n.4)

Ninth, and District of Columbia Circuits, and is implicit in this Court's *Theater Enterprises* and related decisions. (Wey/Wil. Br. 35-37, 40-43)

The government observes that courts should be "vigilant" when instructing a jury on these points, since settled economic and legal doctrine may seem counterintuitive to laymen "possessing little sophistication concerning the operation of economic markets." (U.S. Br. 9) Yet the United States concedes that "the trial court did not give the precise cautionary instruction that we believe proper." (*Id.* at 4) The government is mistaken, as are respondents, that this defect was remedied by other portions of the charge.

Thus, it is no answer that the jury was instructed that petitioners' actions violated Section 1 "only if they were done as a result of contract, combination, or conspiracy." (*Id.* at 12; Resp. Br. 35) This merely repeats the statutory language. It instructs that an agreement must be proved, without telling how. This deficiency was not cured by telling the jury that parallel behavior is not illegal "[i]n and of itself." (U.S. Br. 13; Resp. Br. 36) Under this instruction, the jury may have believed that it could not rely on conscious parallelism without something more (but see p. 4, *supra*), but the instruction most assuredly did not tell the jury that the "something more" required by the law is proof that the conduct was against the defendants' individual self interest.

This critical omission was exacerbated by other portions of the charge which misled the jury on this precise issue. The government quotes the instruction that the fact "that some practice was being followed that was artificial or arbitrary or unduly complicated . . . would not mean that it was a product of a conspiracy. . . . " (U.S. Br. 13; ellipses in original) But the rest of that sentence, omitted by the government's second ellipsis, emphasized that neither "would the fact, if it be a fact, that the practices were logical and convenient and helpful indicate that *there wasn't a conspiracy.*" (Tr. 3541, J.A. p. 187) In short, the charge permitted the jury to infer

conspiracy from parallel conduct even though it concluded the conduct was logical, convenient, and even helpful.[7]

C. The evidence was insufficient to support the verdict under the proper legal standard.

The shortcomings in the jury instructions carried over into the legal standard employed by the lower courts to review the sufficiency of the conspiracy evidence. Not only did the trial court uphold the verdict as to the 30 "co-conspirators" based solely on the "industry-wide" use of the challenged freight practices (Pet. J.A., C-3), but it did so without investigating if those practices were against the independent self interest of the manufacturers. It also made no such investigation regarding petitioners' actions.

The Fifth Circuit was equally silent on this decisive point. It rested its affirmance on the "parallel pricing conduct clearly demonstrated in the record," plus the "communication between high-level personnel on pricing policy," without examining whether the parallel conduct was compatible with the producers' individual competitive interests. (655 F.2d at 634, Pet. J.A., A-9)

Because neither the jury, the trial court nor the Fifth Circuit evaluated the evidence under the correct standard,

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[7] The government errs in stating that petitioners "did not request the type of instruction we have described." (U.S. Br. 14 n.12) Petitioners requested a charge that, to rely on defendants' parallel conduct, "the plaintiffs must show that any similar actions by the defendants were contrary to those defendants' independent business interests." (J.A. p. 156-57) The government is also wrong that petitioners' instructions did not "inform the jury that parallel pricing and opportunities to conspire do not, even in combination, permit an inference of collusion." (*Id.* at 14-15 n.13) Petitioners requested an instruction that evidence of opportunity contacts "[b]y itself" cannot support a conspiracy finding. (J.A. p. 158) Read with the requested charge quoted above, this would have precluded a finding of conspiracy based solely on opportunity contacts and parallel conduct that was consistent with self interest.

the conspiracy verdict is not saved by the "two court rule."[8] Nor can these errors be dismissed as "harmless" on the theory that the same verdict would have resulted under the proper legal standard. This presupposes that the jury, if properly instructed, would have accepted respondents' thesis and rejected that of petitioners on the crucial question of whether the method of quoting plywood prices was contrary to the self interest of each manufacturer.

More than a new trial is warranted, however. Properly analyzed, respondents' evidence was clearly insufficient to show that the challenged practices were not in the producers' competitive self interest. Respondents argue, for example, that the producers acted contrary to their interests when they "made no attempt to negotiate" for actual rather than West Coast freight in buying plywood from other producers. (Resp. Br. 27) But this begs the question—it was not contrary to their interests if the delivered price would have remained the same if actual freight had been quoted. The buyers recognized that the pricing format was just "a matter of form." (Tr. 2135, J.A. 303) Consequently, if they had negotiated a lower freight charge, they would simply have paid a correspondingly higher mill price. (*See* Tr. 2134-36, J.A. 303-04)

As another example, respondents cite a 1967 incident in which Scotch Plywood of Fulton, Alabama declined to sell to an Elkhart, Indiana customer. The producer's letter (written before the alleged conspiracy period) indicated that, since high freight costs rendered such distant sales uneconomical on a delivered price basis, Scotch preferred to focus its efforts on nearby customers. (PX 420, J.A. 438 (Tr. 1327); PX 421, J.A. 439 (Tr. 1327).) Unless the widespread use of delivered pricing by American industry is to be condemned wholesale,

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[8] *Great A&P Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147, 153-54 (1950) (two court rule inapplicable where finding "cannot stand as a matter of law" because of the application of a standard "that is less exacting than that required"). *Accord, Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 198 n.9 (1973); *Neil* v. *Biggers*, 409 U.S. 188, 193 (1972); *Baumgartner* v. *United States*, 322 U.S. 665, 671 (1944).

such an economically rational decision can hardly be taken as evidence of collusion.

Respondents also argue that the jury was entitled to rely on their expert's characterization of the challenged practices as "arbitrary and artificial" because "the freight charges bore no relation to the actual cost of shipping plywood." (Resp. Br. 22-23) This misses the point. The *delivered prices,* which the expert chose not to examine (Tr. 2390-92), did reflect actual shipping costs as a result of the producers' adjustments in mill prices. There is nothing "artificial" in such a method of price quotation when it responds to customer preference for a format that facilitates price comparison.

The government recognizes that there was nothing inherently "artificial" in the practices when noting that they "could have arisen without collusion during the early years of the southern plywood industry, which did not then have sufficient capacity to satisfy local demand and which competed with west coast suppliers to meet that demand." (U.S. Br. 19 n.18) The government posits, however, that "[u]nder competitive conditions" the expansion of southern capacity to satisfy local demand "would have had the effect of driving higher-priced distant producers from the local market." (*Id.*) What the government overlooks is that this is exactly what happened here. As southern capacity increased, southern prices fell, thereby driving western plywood out of more and more southern markets. (Tr. 608; Tr. 1380-81)

The government further posits that the fall in southern prices "could have occurred either through elimination of phantom freight and abandonment of the basing-point formula, or through progressive reductions in the quoted base price." (U.S. Br. 19 n.18) The government again overlooks that the latter is exactly what happened here. (Wey/Wil. Br. 13) The government concludes: "It could be expected that the obsolete basing-point formula eventually would be abandoned even in the latter case." (U.S. Br. 19 n.18) This would be true, however, only if the southern mills served a single "local" market in which their capacity was

sufficient to supply all demand. This was concededly not the case. Even at the end of the alleged conspiracy, southern and western plywood continued to compete in the large central and eastern markets. (DX 258, J.A. p. 467 (Tr. 2950); DX 259 (Tr. 2949); Tr. 2949-54)[9] In light of this ongoing competition, the Ninth Circuit concluded that customers continued "to prefer the ready price comparison between western and southern plywood made possible by the use of the West Coast index price." (637 F.2d at 578, Pet. J.A., J-11; see also Tr. 299-30; Tr. 2747)

The Ninth Circuit's decision cannot be dismissed, as respondents now urge, because of imaginary or inconsequential differences in the record. (Resp. Br. 10 n.7)[10] Unlike the trial court and the Fifth Circuit, the Ninth Circuit recognized that "conscious parallelism is evidence of agreement only if additional facts indicate that the decisions are inexplicable as ordinary competitive decisions." (637 F.2d at 581, Pet. J.A., J-17) Applying this standard the court reached the only justifiable conclusion: the challenged method of quoting prices was "a natural and competitive development in the emergence of the southern plywood industry"; the "use of West Coast freight made possible ready comparison between western and southern plywood prices"; and this procompetitive purpose continued to be served throughout the alleged conspiracy period because "southern plywood continue[d] to compete with western plywood in many areas

[9] Respondents' assertion that the southern producers had significant excess capacity (Resp. Br. 24) is based on a comparison of *year end* capacity with the full year's production. Such a comparison is invalid where, as here, new capacity was constantly (and rapidly) coming on stream throughout the year. (See Wey/Wil. Br. 47)

[10] For example, respondents persist in repeating the Fifth Circuit's mistake that the FTC presented no economist, when one was called. (91 F.T.C. at 70-71) They also cite five assertedly "critical documents that were not introduced in the FTC case." (Resp. Br. 10 n.7) Three of these (PXs 393, 410 and 539) are not even mentioned as evidence of conspiracy (Resp. Br. 11-18). The other two (PXs 420, 421) are disposed of at page 11, *supra*.

of the country." (*Id.* at 574, 578, 582, Pet. J.A., J-2 to -3, J-11, J-18) Precisely the same analysis merits entry of judgment for petitioners here. At the very least, a new trial is required under the correct standard.

II. The Jury Was Never Instructed On The Proper Measure Of Damages; Nor Was The Issue Tried.

As petitioners showed in their opening brief, and the United States aptly summarizes, the proper "measure of damages in an antitrust action rests on a 'comparison of . . . prices . . . as affected by the conspiracy, with what they would have been in its absence under freely competitive conditions.' " (U.S. Br. 22, quoting *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); Wey/Wil. Br. 49-50) No such charge was given—nor was the issue considered by the Fifth Circuit—and respondents' three *post hoc* rationalizations for these critical failings are without merit.

A. Respondents must show what plywood prices would have been absent the alleged conspiracy.

Respondents first argue there was no "duty to instruct the jury that the legal standard for damages is the difference between the price charged and the hypothetical price that would have prevailed absent conspiracy." (Resp. Br. 54) Surprisingly, respondents rely on *Bigelow*—the very case quoted by the United States to support such an instruction. (*Id.* at 19) Respondents misread the case. They confuse the lesser degree of specificity allowed when proving up damages with the proper *measure* of those damages. *Bigelow* explicitly reaffirmed that a treble damage plaintiff must prove what the price "would have been . . . under freely competitive conditions"; it merely recognized that this price need not be proved with "exactness." (327 U.S. at 264)

Nor do the other cases cited by respondents and the *amici* States suggest that the proper measure of damages can be disregarded because of a desire "to achieve clarity, efficiency and reasonable simplicity in complex antitrust litigation." (Resp. Br. 51; States Br. 9-12) Those cases all dealt with standing to sue; they concerned "*who* is entitled to prosecute

an action under §4," not *how* a plaintiff's damages should be measured.[11] None holds that a plaintiff with standing need not prove by some reasonable estimate the amount by which actual prices exceeded those in a competitive market.

Respondents' obligation to establish what they denigrate as the "hypothetical" competitive price is no different from what must be shown in any antitrust case: "To find the damage attributable to an antitrust violation, we must compare the plaintiff's actual situation with *the hypothetical situation* that would have existed in the absence of the violation." II P. Areeda & D. Turner, *Antitrust Law* ¶344 (1978).

B. Respondents' "*prima facie*" theory cannot substitute for the proper measure of damages.

Respondents also claim the trial court was not required to "focus the attention of the jury on the *full delivered price of the plywood* to plaintiffs," contending they made out "a *prima facie* case on measure of damages when, having proved conspiracy, they establish[ed] the extent of overcharge *on one component of the price.*" (Resp. Br. 46-47, 54) Indeed, respondents contend that *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980), stands for a rule that they were "presumptively harmed" in the full amount of the freight and weight "overcharges." (Resp. Br. at 48)

Once again, respondents misread the authorities. The only issue addressed in *Catalano* was whether an agreement to fix one element of price was subject to the *per se* or rule of reason test. In the context of deciding which *liability rule* applied, the Court was unwilling to presume that "the elimination of

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[11] *Blue Shield of Virginia* v. *McCready*, 102 S. Ct. 2540, 2547 n.11 (1982), (whether purchaser of psychiatric services from psychologist has standing to challenge group boycott by psychiatrists); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) (whether indirect purchasers have standing to sue); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972) (whether States have standing to sue for injury to their "general economy"); *Hanover Shoe* v. *United Shoe Mach.*, 392 U.S. 481 (1968) (whether "passing on" defense can defeat the standing of a direct purchaser).

a practice of giving variable discounts will ultimately lead in a competitive market to corresponding decreases in the invoice price," although it conceded such effects were possible. (446 U.S. at 649) This can hardly mean that, at the *damages* stage, such adjustments are presumed to be impossible. To the contrary, by recognizing that an agreement to fix a single element of price "may turn out to be harmless in a particular set of circumstances" due to offsetting adjustments to other elements (*id.*), *Catalano* underscores the requirement that plaintiffs must prove the amount by which the challenged conduct increased the *total* price.

The United States rightly stresses that the effect of the challenged freight practices on the total plywood price cannot be determined in isolation; it is necessary to examine the other major element of the delivered price—the base or mill price. "If, but only if, southern producers were adding west coast freight to the same base price that would have prevailed in a competitive market would the difference between west coast and actual freight be an accurate measure of damages." (U.S. Br. 27) While petitioners had no chance to present a full defense on this issue because of the the trial court's severance order, the evidence they adduced on the conspiracy and impact issues, as well as in opposition to summary judgment on damages,[12] shows that: (a) during the alleged conspiracy, mill prices were lowered to reflect higher West Coast freight and standard weights, and (b) after the producers switched to f.o.b. mill prices, those mill prices rose so that there was no overall effect on delivered prices. (Wey/Wil. Br. 56-61)

The jury was never in a position to consider these points, since the instructions did not direct it to the impact of the challenged practices on the total price. This issue cannot be sidestepped, as respondents contend, because petitioners

[12] Contrary to respondents' accusation (Resp. Br. 53), there was no "impropriety" in petitioners' citation to affidavits of its expert and its counsel filed in opposition to the very summary judgments that are the subject of this petition.

"regularly treated and reported these charges as additional profits in their own contemporaneous financial records." (Resp. Br. 40) In fact, there was no "regular" treatment: Georgia-Pacific kept such records for each individual transaction; Willamette kept track only on the basis of monthly averages; and Weyerhaeuser did not keep track at all. (*Compare* PX 589, J.A. p. 447 (Tr. 1961-62); PX 570-79 (Tr. 2710))

Even where records were kept, there is nothing to respondents' simplistic notion that they show "the full amount of the freight pickup flowed into defendants' treasuries as extra profits." (Resp. Br. 43) This is demonstrated by App. B to respondents' brief. The exhibit shows "freight pickup" for the "year to date" as $985,080, which far exceeds the final computation of pre-tax profit of $652,372. Manifestly, "freight pickup" is not a proxy for the proper measure of damages.

Nor was petitioners' purpose in maintaining "freight pickup" records to keep track of "the spoils of their conspiracy." (Resp. Br. 46) The records served entirely legitimate business purposes. Mr. Fuller of Georgia-Pacific explained at length that the "freight gain" on each transaction was a useful tool to determine which mill could most economically ship to which customer. (Tr. 230-36) Surprisingly, respondents cite this testimony as "conced[ing]" that such records "were not needed for competitive purposes." (Resp. Br. 43)[13]

Finally, the government aptly summarizes the infirmities in respondents' claim that the measure of damages was established by the testimony of their expert. (Resp. Br. 45-46) The expert "did not testify that, absent collusion, competitive prices in the plywood industry would have been decreased by the entire amount of 'phantom freight' and 'underweights.' ... The expert did not testify as to what production costs were, or what the delivered price would

[13] Respondents' appellate counsel are wrong that "[n]o witness came forward to explain the freight gain tables...." (Resp. Br. 51) In addition to Fuller, *see* Tr. 613, 625, 679-80.

have been in a competitive market. Moreover, he did not specify or even estimate the time at which supra-competitive prices should have been totally eliminated." (U.S. Br. 27) In light of these "serious shortcomings," the testimony is "insufficient as a matter of law to support the damage computation adopted by the jury." (*Id.* at 26)[14]

C. Petitioners did not "default" on measure of damages since the issue was never tried.

In a final effort to rationalize the lack of proper instructions, respondents claim that "the court had no other choice" because petitioners "purposefully defaulted" on rebutting respondents' proof. (Resp. Br. 55, 62) On the contrary, petitioners' failure to mount a defense on measure of damages reflected their justifiable understanding that the issue had been severed for later trial—an understanding shared by respondents' trial counsel.

In contrast to respondents' present arguments, their Proposed Instruction No. 18 conclusively demonstrates that they too thought the first trial was limited to the issues of statutory violation and impact, and that *all damage issues* were to be tried later. Based on an instruction by the same trial judge in an earlier case, respondents' proposal carefully deleted all references to damages by inserting new language in brackets and lining out language irrelevant to this case:

> "The plaintiffs in a civil case must prove each element of their case. In this particular case there are ~~three~~ [two] elements. Number one, that one or more of the defendants violated an antitrust law. Number two, that the plaintiffs were injured [by that violation]. ~~And number three, as to the amount of damage claimed as a result of that injury caused by such statutory violation.~~

[14] Indeed, the government observes that "the jury's award of damages rests on no discernible factual foundation." (U.S. Br. 27) Consequently, if respondents are taken at their word that they "knew that measure of class damages was an issue to be tried" (Resp. Br. 55), their failure of proof would justify a j.n.o.v. on damages.

~~Those are the three elements plaintiffs must prove ultimately in this case.~~" (Photoreproduced at App. A-1 to this Reply)

Respondents' contemporaneous understanding is further confirmed by their Proposed Instruction No. 45, which stated that, at the first trial, "all that you are called upon to decide is whether the defendants did combine to fix prices, or any part of the price they charged; and, second, whether what they did had any influence or effect on that aspect of the price. You will not now be asked to determine the specific amount of damage suffered by any plaintiff or plaintiffs as a whole, but only whether the acts of defendants did some damage to one or more of the plaintiff class in some amount, however large or small." (App. A-3 to this Reply)

Respondents assert that an October 30, 1978 brief reflects a contrary understanding because it "stated that they had proved that the measure of class damages was the freight gain and the gain from the underweights." (Resp. Br. 59-60) In actuality, the brief focused on the issue of impact, concluding that "[p]laintiffs have proved 'impact' by the evidence" that the defendants kept records of the freight differentials. Moreover, a companion brief filed the same day asked for partial summary judgment solely "on the issues of liability and impact," stating: "Such a decision would terminate the first major phase of the litigation and enable the Court and the parties to focus promptly on the issue of the amount of damages both in the aggregate and for individual class members." (Vol. 30, 22,275-99)

Finally, there is patently no merit to respondents' claims that petitioners waived their due process right to a full and fair hearing on measure of damages. (Resp. Br. 56, 61-62) First, the reason petitioners did not object to or seek clarification of the bifurcation in Pre-Trial Order No. 9 was that they thought it clearly limited the first trial to statutory violation and impact. This was reinforced by the trial judge's opening remarks to the jury, which expressly stated it would be determining "whether or not these three defendant companies did violate the antitrust law in the way the plaintiffs claim, and if so, whether that caused impact or damage," but

"will not be determining the amount, the dollar amount of any such overcharge." (Tr. 5-6, J.A. p. 131)

Second, petitioners did in fact take strong and timely objection when the trial court submitted its special verdict form. (*E.g.,* Tr. 3572-73, J.A. pp. 204-05) Respondents ignore the realities of complex litigation when they suggest that petitioners should have moved at that late stage to reopen testimony to present a jerry-built defense on damages.

Third, what respondents call a "passing reference" to the due process issue in petitioners' Fifth Circuit brief was in fact a four-page argument that "defendants were thus deprived of a hearing on the measure of damages and hence deprived of due process of law." (Brief of Appellants at 71-75) As even the trial court acknowledged:

> "[T]he defense preserved of record the objections that it, or they, were surprised; and I have not, I don't think, at any point said that there was a waiver of their right to contend surprise and that the verdict form went outside what should have been." (J.A., pp. 236-37)

CONCLUSION

The judgments below should be reversed or, at a minimum, a new trial should be ordered on all issues.

Respectfully submitted,

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APPENDIX

PLAINTIFFS' PROPOSED INSTRUCTION NO. 18:

~~The plaintiffs got the right to open and close arguments, and I indicated at that time that was because they had the burden of proof, and I would get into what the burden of proof is.~~

The plaintiffs in a civil case must prove each element of their case. In this particular case there are three [two] elements. Number one, that one or more of the defendants violated an antitrust law. Number two, that the plaintiffs were injured [by that violation]. ~~And number three, as to the amount of the damage claimed as a result of that injury caused by such statutory violation.--Those are the three elements plaintiffs must prove ultimately in this case.~~

The defendants have denied each [both] of those elements, and so it becomes up to the plaintiffs to prove them. ~~because the filing of the complaint shouldn't be taken as any evidence at all that the defendants are guilty of the doing of what is claimed they did.~~

~~The only element right at the moment we are dealing with is the question of statutory violation.--As I have explained, if that is answered favorably to the plaintiffs, we would then go as to the twelve trial units, their claims for injury and damage.--So we are dealing here at this phase, with the plaintiffs' responsibility to prove that there has been a violation of this antitrust law by one or more of the defendants.~~

How do they prove that? What is the measure of responsibility that they must satisfy?

They must do this by a preponderance of the credible evidence, both direct evidence and circumstantial evidence, giving of course the weight to each as you determine it deserves. This is not a criminal case; it is a civil case. There is no requirement that the plaintiffs prove the elements of their case beyond a reasonable doubt, rather it is that they prove it to your reasonable satisfaction that there was a statutory violation by one of more of the defendants. In short, it is their burden to prove on some particular point that is in controversy that the evidence which supports their side of that particular proposition, direct and circumstantial, has the more convincing force than the evidence that seems to oppose that construction or contention.

Another way of saying it is, whether the plaintiffs in the presentation of the evidence have shown that what they say the facts are is more likely true than not true -- more likely true than not true. If they have, then we would say they have satisfied their burden on that particular matter.

Taken from the Court's Instructions in Cast Iron Pipe Anti-trust Litigation. Tr. 31-34.

PLAINTIFFS' PROPOSED INSTRUCTION NO. 45

In this part of the case, all that you are called upon to decide is whether the defendants did combine to fix prices, or any part of the price they charged; and, second, whether what they did had any influence or effect on that aspect of the price. You will not now be asked to determine the specific amount of damage suffered by any plaintiff or plaintiffs as a whole, but only whether the acts of defendants did some damage to one or more of the plaintiff class in some amount, however large or small. If you find that they did combine and there was any such effect on what the plaintiffs or any of them paid, then you must find in favor of plaintiffs and against defendants, leaving for further proceedings the specific amount to be determined.

Amicus Brief

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Nos. 81-1618 and 81-1619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WEYERHAEUSER COMPANY and
WILLAMETTE INDUSTRIES, INC.,
Petitioners

v.

LYMAN LAMB COMPANY, *et al.*

GEORGIA-PACIFIC CORPORATION,
Petitioner

v.

LYMAN LAMB COMPANY, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE STATES OF ALASKA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING, AND THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS, AND PENNSYLVANIA, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether there was sufficient evidence to support the jury's verdict on the measure of damages, and whether the district court correctly instructed the jury on the measure of damages.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1618

WEYERHAEUSER COMPANY and
WILLAMETTE INDUSTRIES, INC.,
Petitioners

v.

LYMAN LAMB COMPANY, *et al.*

No. 81-1619

GEORGIA-PACIFIC CORPORATION,
Petitioner

v.

LYMAN LAMB COMPANY, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE STATES OF ALASKA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING, AND THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS, AND PENNSYLVANIA, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE STATES

The states have unique and important interests arising out of their dual sovereign and proprietary roles in the enforcement of the federal and state antitrust laws. Senator Sherman in 1890 stated that the legislative intent of the federal antitrust laws was to supplement existing state enforcement. 21 Cong. Rec. 2457 (1890). State attorneys general (and corporation counsel in the District of Columbia) have primary enforcement responsibility under their state antitrust laws; those laws are often construed consistently with this Court's interpretation of the federal antitrust laws. Under the federal antitrust laws, the states are entitled to seek injunctive relief and to recover damages. 15 U.S.C. §§ 15, 26. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 260-62 (1972). State attorneys general may also bring a damage action in the names of their states as *parens patriae* on behalf of state residents who have been injured by violations of the Sherman Act. 15 U.S.C. §§ 15c-15h. The states have appeared before this Court as *amici curiae* in other private treble damage actions where the issues presented have a significant bearing on antitrust enforcement. *See, e.g., Reiter v. Sonotone*, 442 U.S. 330 (1979); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).

The states also purchase an enormous amount and a wide range of goods and services. In 1980, the 50 states and their political subdivisions spent approximately $228 billion for goods and services. Council of State Governments, 25 *The Book of the States* 376 (1982). As with any purchaser, the states are injured by overcharges resulting from antitrust violations; to recover for such injuries they have actively prosecuted antitrust actions for monetary relief. *See generally* National Association of Attorneys General, *State Antitrust Laws and Their Enforcement* (1974), *Antitrust Bulletin* (monthly, 1974-80),

and *Antitrust Report* (monthly, 1980 to present). Indeed, three states, Connecticut, Oregon, and Virginia are plaintiffs in these actions.

Accordingly, the states, in both their sovereign and proprietary capacities, have direct and substantial interests in the promotion of a competitive environment, in the standards for enforcement of the antitrust laws, and in their ability to obtain legal redress for injuries they and their citizens suffer by reason of antitrust violations.

STATEMENT

The district court entered and the court of appeals sustained a judgment assessing treble damages under Section 4 of the Clayton Act against petitioners for their conspiracy to fix the price of plywood. The jury returned a special verdict measuring respondents' damages as the amount of the overcharge, i.e., the excess or phantom freight paid for "west coast" (and "standard" weight) rather than actual freight (and actual weight).

At a four week trial in October, 1978, respondents presented evidence to establish a conspiracy among petitioners to raise the price of plywood by an overcharge resulting from the uniform substitution of inflated freight charges for actual freight. Specifically, western plywood producers agreed to compute freight charges based on "standard" or "association" weights. As these agreed weights were nearly always greater than actual weight, delivered prices for western plywood were artificially inflated (Br. Opp. 2-3). Southern producers likewise inflated their delivered prices by agreeing to charge rail freight from the west coast for plywood manufactured in the south. (Br. Opp. 1-2). Petitioners sought to persuade the jury that there was no conspiracy, and that even if there were, that respondents suffered no damages.

Faced with the task of resolving the all-or-nothing positions presented to it by the parties, the jury agreed with respondents that the proper damage measure was the amount of the overcharge.

Using a special verdict, the jury found that: 1) during the period of February 1968 to December 1973, petitioners had conspired to use "west coast freight" in the pricing of southern plywood, and to use "standard weights" in the pricing of western plywood (Pet. App. I-1-2); 2) such pricing conspiracies caused financial injury to respondents (*id.* at I-2-3); and 3) the measure of damages was equal to the amount by which the "west coast freight" charge exceeded the actual freight charge on southern plywood, and the amount by which the "standard weights" charge exceeded the actual weight charge on western plywood (*ibid.*).

The district court denied petitioners' motions for a new trial and judgment n.o.v. and entered judgment upon the special verdict (Pet. App. C-2-7). Finding sufficient evidence to support the jury's determinations, the court of appeals affirmed the judgment in all respects and specifically concluded: 1) that there was a price fixing conspiracy (Pet. App. A-5-9); 2) that the petitioners' conspiracy had injured respondents' business or property (*id.* at A-9-10); and 3) that respondents' damages were measured by "the amount of phantom freight and underweights paid by [respondents]" (*id.* at A-10-12).

SUMMARY OF ARGUMENT

1. The jury's verdict that the measure of damages equalled the overcharge is supported by sufficient evidence and is consistent with the applicable law. Respondents established the elements of a prima facie case of injury and damage under Section 4 of the Clayton Act by proving the fact and amount of the overcharge caused by

petitioners' conspiracy. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 489 (1968). There was sufficient record evidence to permit the jury to measure the damages as the overcharge, i.e., the excess paid for freight computed from the west coast rather than the actual freight, and from "standard" rather than actual weight. Under well-established rules approved by this Court, the proof of the extent of damages may be approximate once the fact of damage is established, and any risk of uncertainty is to be borne by the wrongdoer. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946). The parties' damage theories presented diametric opposites for jury resolution, with petitioners denying any damages at all and respondents asking for damages in the amount of the overcharge; petitioners having lost, are seeking a "second bite at the same apple" (Pet. App. B-5). Petitioners now assert that the jury was required to presume offsets to the illegal overcharge, i.e., that total price would be adjusted to offset the phantom freight overcharge. Petitioners' assertion is wholly unsupported by any competent evidence and is contrary to the teaching of this Court in *Catalano, Inc. v. Target Sales, Inc.*, 466 U.S. 643 (1980). If accepted, this assertion would also require antitrust plaintiffs initially to offer more than a prima facie damages case. Such a new burden would threaten the effectiveness of treble damage actions by its inherent complications, and should be rejected.

2. Viewed in the context of the entire trial, the charge to the jury on the measure of damages was proper and should be sustained. Guided by straightforward instructions and a special verdict form, both of which clearly reflected the evidence and the parties' theories, the jury could not have failed to understand its task in ascertaining the extent of the overcharge.

ARGUMENT[1]

I. THE COURT OF APPEALS CORRECTLY SUSTAINED THE FINDINGS OF THE JURY AND OF THE DISTRICT COURT ON THE MEASURE OF DAMAGES.

A. The Jury's Verdict And Decisions Of The District Court And Of The Court Of Appeals Are Supported By Legally Sufficient Evidence.

1. *Damages in a price fixing case are measured by the extent of the overcharge to the victim.*

It has been established in this Court since the early part of this century that the victim of a price fix resulting in an overcharge is entitled to damages in the amount of that overcharge. *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906); *Thomsen v. Cayser*, 243 U.S. 66, 88 (1917); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 489 (1968); *Hawaii v. Standard Oil Co.*, 405 U.S. 251 n.14 (1972). While the finder of fact may not engage in speculation or guesswork to ascertain the amount of overcharge attributable to the conspiracy, this Court has long recognized the importance of permitting recovery once the fact of damage has been established, even where the extent of damage may be only approximate. *See, e.g., Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927); *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 563, 565-66 (1931); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). This rule is based on two important considerations. First, "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created." *Bigelow*, 327

[1] Although our argument is limited to the damages issue, amici states submit that the decision of the court of appeals on liability should be affirmed. We adopt the Brief for the United States as Amicus Curiae on the conspiracy issue, except to the extent that it suggested harmless error in the jury instructions, which we believe were proper and free of even harmless error.

U.S. at 265. As the Court recognized just last Term, "business damages [are difficult to ascertain] . . . [t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1982). Second, federal courts constantly seek to ensure some remedy for a wrong done (*Story Parchment*, 282 U.S. at 565-66; *Bigelow*, 327 U.S. at 265), and express the principle that violators ought to be deprived of "the fruits of their illegality." *Hanover Shoe*, 392 U.S. at 494; *Blue Shield of Virginia v. McCready*, No. 81-225 (June 21, 1982), slip op. 7 n.10. The importance of such principles has resulted in recovery by direct purchasers of the full amount of the overcharge even where such overcharge may have been passed on (*Hanover Shoe*, 392 U.S. at 494; *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)), or recouped by the victim in some other way. *Hanover Shoe*, 392 U.S. at 489; *Hawaii v. Standard Oil Co.*, 405 U.S. at 263 n.14. As a result of these policy considerations favoring effective antitrust enforcement, this Court has traditionally lightened the burden of damages proof for antitrust plaintiffs once a violation is established. *Cf. J. Truett Payne*, 451 U.S. at 565, 568 (1982).[2]

2. The jury's verdict measuring damages as the extent of the overcharge is consistent with the applicable law and is supported by sufficient evidence.

This Court has described the plaintiff's burden of proof in damages cases as follows: "[w]e think it sound to hold that when a buyer shows that the price paid by him

[2] The Court there properly refused to apply the proof of damages rules discussed above, since no violation of the Robinson-Patman Act had been established and the rules apply only after a violation has been shown. *J. Truett Payne*, 451 U.S. at 568. By contrast in the case at bar, the rules apply, since respondents have established a violation of the Sherman Act.

for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4." *Hanover Shoe*, 392 U.S. at 489. In the case at bar, the elements required by the case law were satisfied by respondents' evidence.

Respondents' proof established a conspiracy among petitioners to charge all purchasers for "phantom" freight rather than actual freight, which caused respondents to pay an illegal overcharge to petitioners. Respondents' prima facie damages case adduced sufficient evidence to establish the amount of this overcharge as the excess or "layer of fat" (Tr. 2367) paid over actual freight and actual weight charges (Tr. 2369). Such evidence included records, regularly compiled by petitioners and relied on by their executives to make important business decisions, categorizing the overcharges as revenue or profit items (*e.g.* Georgia-Pacific: PX 54, 589; Tr. 616, 1664-65; Willamette: PX 430-33, 708-10, 713-15, 729, 912; Weyerhaeuser: PX 227, 221; Tr. 827-28). Other evidence showed that these elaborate computations of freight overcharges were expensive to compile and were not needed for competitive purposes (*e.g.* Tr. 230-36). Moreover, petitioners' price lists (*e.g.* PX 213, 219), showing comparable west coast and southern mill prices and west coast freight added thereto, is compelling evidence as to the amount of the overcharge.

Expert testimony provided still more evidence of the overcharge attributable to the conspiracy. Rare as it is that adversaries' experts agree on any critical issue, the experts in this case agreed that the freight overcharges would disappear with competition in the plywood industry (*see* Tr. 2471-72 (respondents' expert) and Tr. 3118 (petitioners' expert)). Petitioners adduced no evidence to establish any other result absent collusion. Moreover, if petitioners believed that the jury should have found a different measure of damages from that offered by respondents, they had the burden to persuade the jury.

Petitioners' case denied that there was any conspiracy, and asserted that even if one were shown, that there was no resulting overcharge to respondents (Tr. 3157-58). The record evidence and the parties' theories thus presented all-or-nothing positions for the jury's resolution. The jury was justified in relying on the expert evidence, together with other record evidence establishing the amount of the overcharge, to reach its resolution on the appropriate measure of damages. The jury's verdict is supported by respondents' prima facie case of establishing the overcharge and its extent, and neither § 4 of the Clayton Act nor case law requires more.

3. *This Court should reject petitioners' efforts to complicate damage proof requirements in treble damage actions.*

Petitioners' theory of presuming offsets to the illegal overcharge should be rejected unequivocally by this Court for several reasons. Such a presumption is contrary to the teaching of *Catalano*, is wholly unsupported by any competent evidence, and was justifiably rejected by the jury. Moreover, if accepted, it promises to complicate the law on antitrust damage proof requirements, jeopardizing effective antitrust enforcement by the states as well as by "private attorneys general" (*Hawaii v. Standard Oil*, 405 U.S. at 262).[3] This Court recently stated in *Catalano*, 446 U.S. at 649:

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[3] The states taken together have developed a unique expertise in treble damage cases, by virtue of their being the single most frequent plaintiffs to seek treble damages under Section 4 of the Clayton Act. Some recent examples of treble damage actions brought by states involve the following products (multidistrict litigation panel number where applicable and court indicated): petroleum products (M.D.L. 150, C.D. Cal.); sugar industry (M.D.L. 201, D. Ariz.; M.D.L. 201A, E.D. Pa.); cement and concrete (M.D.L. 296, D. Ariz.); armored cars (M.D.L. 311, N.D. Ga.; M.D.L. 387, C.D. Cal.); wiring devices (M.D.L. 331, E.D.N.Y.); passenger tires (M.D.L. 386, N.D. Cal.); natural gas (M.D.L. 403, D.N.M.); art materials (M.D.L. 436, N.D. Ohio); mid-Atlantic Toyota auto-

> While it may be that the elimination of a practice of giving variable discounts will ultimately lead *in a competitive market* to corresponding decreases in the invoice price, *that is surely not necessarily to be anticipated.* It is more realistic to view an agreement to eliminate credit sales as extinguishing one form of competition among the sellers. [Emphasis added.]

Thus in the instant case, it can not be presumed that the total price would be adjusted to offset the phantom freight overcharge. Moreover, there was no competent evidence to support any damage verdict other than the all-or-nothing choice in the special verdict. A different damage result such as petitioners suggest would necessarily have involved the jury in prohibited speculation or guesswork.

Petitioners' theory also jeopardizes "Congress' 'expansive remedial purpose' in enacting § 4" (*McCready*, slip op. 6), since it is contrary to the principle reaffirmed just this year that " 'this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress. . .' " *McCready*, slip op. 6 n.9. As this Court has noted, victims of price fixing faced with complicated proof requirements may well be deterred from bringing treble damage actions, allowing antitrust violators to "retain the fruits of their illegality":

> We are not impressed with the argument that sound laws of economics require recognizing this defense. A wide range of factors influence a company's pricing policies. *Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different* (a single supply less expensive, general economic conditions

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mobiles (M.D.L. 456, D. Md.); cast iron pipe (N.D. Ala.); fertilizer (E.D. Wash.); Montgomery Co., Md. real estate (D. Md.); steel rebar (E.D. La., S.D. Tex., W.D. Wash.).

> more buoyant, or the labor market tighter, for example), *he would have chosen a different price.* Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. *Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discounted* . . . . Treble damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories.
>
> . . . In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. *Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.* [Emphasis added; footnote omitted.]

Hanover Shoe, 392 U.S. 492-94. *See also, Hawaii v. Standard Oil Company*, 405 U.S. at 263 n.14. Although petitioners here do not raise a pass-on defense, the necessary consequence of their theory for plaintiffs' proof requirements is to create the same "nearly insuperable difficul[ties]" (*Hanover Shoe*, 392 U.S. at 493) which led this Court to prohibit the pass-on defense out of concern that it would require " 'massive evidence and complicated theories' . . . [which would] discourage vigorous enforcement of the antitrust laws by private suits." *McCready*, slip. op. 9 n.11.

Complications in damage proof requirements will inevitably result from a requirement, as suggested by peti-

tioners, that an antitrust plaintiff's damage case include anticipatory rebuttal of defendants' theories on how the conspirators might have reacted in a competitive market. This requirement would be contrary to the applicable principle of law that "the wrongdoer shall bear the risk of uncertainty." *Bigelow*, 327 U.S. at 265. Effective enforcement of the antitrust laws through private treble damage actions will be seriously jeopardized by the acceptance of such an unworkable standard of damage proof, as antitrust plaintiffs will be deterred by a requirement that they present more than the prima facie damages case described by this Court, *Hanover Shoe*, 392 U.S. at 489. Such deterrence would be contrary to this Court's "longstanding policy of encouraging private enforcement of the antitrust laws . . ." *Illinois Brick*, 431 U.S. at 745.[4] That policy supports adherence to a rule under which plaintiffs are assured of recovering "the full amount of the overcharge," even when defendants may seek to prove that some or all of the overcharge was passed on to another, 431 U.S. at 745-46, or that the victim may have recouped the overcharge. *Hanover Shoe*, 392 U.S. at 489.

B. The District Court's Charge To The Jury On The Measure Of Damages Was Proper.

This Court has reiterated the "well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973) (citing *Boyd v. United States*, 271 U.S. 104, 107 (1926)). The Court's "task is also to view the

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[4] Although amici states submit *Illinois Brick* was wrongly decided and continue to seek legislative redress from its adverse consequences for antitrust enforcement at both the federal and state levels, the quoted dicta are sound and relevant to a salutary resolution of this case.

charge itself as part of the whole trial," *United States v. Park*, 421 U.S. 658, 674 (1975), that is, "[to] recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instructions of the jury by the judge." *Cupp*, 414 U.S. at 147.

In this case, the district court's special verdict questions and straightforward, uncomplicated instructions on damages reflected the evidence presented and the parties' damage theories. The jury instructions, beginning with the admonition against speculation or guesswork (Tr. 3494), included the respondents' burden to "prove to your reasonable satisfaction that these practices had a financial damage, caused financial damage to the people who bought plywood . . ." (Tr. 3552), and required the jury to determine (as to southern plywood) "whether the damage that was caused to purchasers is, as the plaintiffs contend . . . the difference between the west coast freight and the actual freight" (Tr. 3553-54), and (as to western plywood) "was that damage equal to the amount by which freight calculated on the basis of the standard weight . . . exceeded the freight that was actually paid" (Tr. 3555). In *Park*, 421 U.S. at 675 this Court concluded, upon "view[ing the charge] as a whole and in the context of the trial," that the record "reveals that the jury could not have failed to be aware [of] the main issue for determination." Likewise in the case at bar, viewing the instructions as a whole in the context of the entire trial record, including the exhibits, the expert testimony, and the parties' theories, the jury could not have failed to understand its task in ascertaining the extent of the overcharge. Based on a record establishing a prima facie damages case for respondents, and keyed to a special verdict wholly consistent with both the evidence and the parties' theories, the jury instructions on damages were

proper. The jury's special verdict on measure of damages should therefore be sustained.[5]

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed in all respects.

Respectfully submitted,

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October, 1982

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[5] We disagree with the speculation of the United States in its Brief as Amicus Curiae at 25 n.25 to the effect that had the jury answered in the negative as to measure of damages, respondents would have been able to try another theory at a subsequent damages trial. Each side presented, and the jury resolved, an all-or-nothing position and the jury found for respondents. The jury made a final decision on measure of damages, not subject to any later retrial of that issue. Moreover, after examining petitioners' offer of damages proof for a proposed second trial on damages, the district court concluded that petitioners offered "nothing new for presentation at another trial—they only seek a 'second bite at the same apple'" (Pet. App. B-5).

Amicus Brief

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Nos. 81-1618 and 81-1619

MOTION FILED

AUG 16 1982

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WEYERHAEUSER COMPANY, *et al.*,
Petitioners,

v.

LYMAN LAMB COMPANY, *et al.*,
Respondents.

GEORGIA-PACIFIC CORPORATION,
Petitioner,

v.

LYMAN LAMB COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF THE BUSINESS ROUNDTABLE AND THE NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND PROPOSED BRIEF

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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF THE BUSINESS ROUNDTABLE AND THE NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The Business Roundtable, an association of chief executive officers of approximately 200 major American companies, and the National Association of Manufacturers (hereinafter "NAM"), move pursuant to Supreme Court Rule 36.3, for leave to file a brief as *amici curiae*

urging reversal of the judgment of the United States Court of Appeals for the Fifth Circuit in this case, *In re Plywood Antitrust Litigation,* 655 F.2d 627 (5th Cir. 1981). On May 17, 1982, this Court granted similar motions by The Business Roundtable and the NAM for leave to file briefs as *amici curiae* in support of the petitions for certiorari. 50 U.S.L.W. 3915. The present motion is made necessary because we have been unable to obtain the consent of the respondents to the filing of the appended brief.

The case now before the Court is the first national class-action antitrust case to be litigated to judgment. Prior to this case, the typical pattern in major antitrust class actions has been pre-trial settlement among all parties. Although many defendants chose to settle in this case, the three petitioners did not. In a decision that facially conflicts with the result reached by another circuit, the non-settling defendants have become exposed to enormous financial liability. For all these reasons, the case has received considerable attention from all segments of the business community.[1]

There is a widespread concern that the decision below will substantially and unjustifiably increase the risks of defending massive antitrust actions. A jury was permitted to adopt a damage calculation that may result in liability of over a billion dollars without any realistic economic proof to support a finding of antitrust injury or to measure its amount. Both the decision itself and the approach that it reflects, therefore, may have a direct impact on the business judgments and the litigation strategy, including settlement decisions, of many of the companies involved in antitrust cases, either as plaintiffs or as defendants.

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[1]*See, e.g.,* Editorial, *Treble Trouble,* Wall St. J., Oct. 29, 1981, at 30, col 1; Blyskal, *Still in the Woods,* Forbes, Oct. 26, 1981, at 70.

The Business Roundtable and the NAM believe that it would be helpful to explain why the decision below is based on unrealistic assumptions about the establishment of delivered prices and why any decision by this Court will have consequences that extend beyond the parties to this case. For these reasons, we request that the Court grant the motion of The Business Roundtable and the NAM for leave to file a brief as *amici curiae*.

Respectfully submitted.

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE BUSINESS ROUNDTABLE AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE

The Business Roundtable and the NAM, as *amici curiae,* urge that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit entered on September 8, 1981, *In re Plywood Antitrust Litigation,* 655 F.2d 627 (5th Cir. 1981).

INTEREST OF THE AMICI CURIAE

The Business Roundtable is an association of nearly 200 chief executive officers of major American companies. The Roundtable's purpose is to examine public issues that affect the economy and to develop and present positions that reflect sound economic principles and responsible public policy. The Roundtable has presented these policy statements in testimony concerning pending legislation before various Congressional committees and in *amicus* briefs before appellate courts.

The National Association of Manufacturers is incorporated under the laws of the State of New York as a non-profit voluntary business association representing approximately 11,000 manufacturing and related business concerns which, in the aggregate, account for an estimated 85 percent of all manufacturing employees and 80 percent of the nation's industrial output.

As explained more fully in the accompanying Motion, the Roundtable and the NAM believe that the issues raised by this case are of general importance to the business community. The standards governing antitrust litigation must be economically sound and clearly defined. The decision below fails to satisfy either goal. That decision is based on a simplistic assumption about the relationship between the individual components of price and the makeup of the total delivered price. The financial consequences of such an ill-founded assumption are magnified when, as in this case, an erroneous measure of damages, coupled with "joint and several liability," governs the outcome of thousands of claims in a nation-wide treble-damage class action.

Judicial decisions like the one below, which ignore economic realities and the commands of this Court, undermine the predictability on which businessmen and

their counsel must rely. The decision of the court of appeals in this case is particularly harmful because it has been the subject of considerable public attention. Since the case provides this Court with an opportunity to address some fundamental issues of antitrust law, particularly the principles governing proof of damages in antitrust cases, the Roundtable, as an association of business leaders, and the NAM, as a broad-based business association, have a particular interest in submitting their views on these issues to the Court.[1]

STATEMENT

1. The Court of Appeals for the Fifth Circuit has upheld a jury verdict which (1) found that petitioners, three major plywood companies, had committed a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, by agreeing on one element of a multi-element price and (2) adopted a damage formula that could lead to a damage award of more than $1 billion against the three petitioners. As the remaining non-settling defendants in this massive class action, petitioners may be liable, under the principle of joint and several liability, for treble the amount of any overcharges paid by class members to settling defendants as well as to petitioners themselves (less only the relatively small amounts actually paid by those defendants in settlement).

According to the court below, the violation by the Southern plywood companies consisted of a parallel method of quoting prices and an agreement to use two specific components—"West Coast freight" and standard

[1] The Roundtable and the NAM take no position on the ultimate merits of plaintiffs' antitrust complaint. Our purpose is to suggest that the courts below applied erroneous legal standards of proof and, therefore, that the judgment of the court of appeals affirming the judgments against petitioners should be reversed.

weights—in calculating the prices offered to customers. There was no claim that the plywood companies agreed on the overall price which they would charge their customers, nor did the court deny the companies' contention that, in fact, the prices ultimately paid by purchasers reflected vigorous competition on the basic component of price, the "mill price" for the plywood, and thus the ultimate delivered price.[2]

According to petitioners, the case was tried on the assumption that damages would be addressed in a later proceeding. On its own motion, however, the trial court submitted interrogatories to the jury that permitted—indeed, virtually required—the finding that, if the jury found any impact on price, the measure of damages was the full difference between the "West Coast freight" component and the actual freight expense for each shipment and the full difference between actual and standard weights. In so ruling, the trial court rejected the argument by the plywood companies that the proper measure of damages should not rest solely on that one component. The companies argued that damages had to focus on the effect on ultimate delivered price, an inquiry that should take into account any actual offsetting effects on the overall prices that would have been charged under a different methodology of quoting freight charges. In affirming the trial court's approach, the court of appeals reasoned that "proof of losses which border on the speculative is allowed in order to facilitate the policy of the antitrust laws." 655 F.2d at 635. Even if speculation were permissible, however, it may not encompass a disregard of economic reality.

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[2] In its opinion certifying the class, the district court noted that "there is no claim that the plywood manufacturer-defendants charged a uniform delivered price to a particular purchaser." *In re Plywood Antitrust Litigation*, 76 F.R.D. 570, 581 (E.D. La. 1976).

2. The decision below could result in the largest antitrust damage award in history. Petitioners question whether the court below applied the correct legal standard in permitting the fact-finder to infer from "parallel conduct plus contacts" that they had conspired to fix a component of price. We have not undertaken to review the factual record in this case, and, therefore, take no position on what the evidence shows. In our view, the proper legal standard in a "conscious parallelism plus" case requires plaintiff to prove, among other elements, that "the observed parallel behavior is inconsistent with the behavior to be expected from each actor pursuing its own economic interests. . . ." *Proctor v. State Farm Mutual Automobile Ins. Co.*, 675 F.2d 308, 327 (D.C. Cir. 1982). Any lower or different standard for proving a conspiracy to fix prices in a conscious parallelism case would broaden the conspiracy net in conflict with the standard adopted by this Court and other circuits.[3] Mere parallel conduct, knowingly pursued, may not properly imply illicit concert if there are reasonable business grounds, like those found by the Ninth Circuit in its assessment of the plywood industry, for companies to take the same action independently. *Cf. Boise Cascade Corp. v. Federal Trade Commission*, 637 F.2d 573, 574, 577-80 (9th Cir. 1980).

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[3] *See, e.g., Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 538-41 (1954); *First National Bank v. Cities Service Co.*, 391 U.S. 253, 279-80 (1968); *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981); *Tose v. First Pennsylvania Bank*, 648 F.2d 879, 894 (3d Cir.), *cert. denied*, 102 S. Ct. 390 (1981); *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 463 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 2001 (1982); *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 884 (8th Cir. 1978).

See generally Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 658-59 (1962).

The primary purpose of the Roundtable and the NAM in submitting our views in this case, however, is to address the lower courts' handling of the damages issues. Our focus is on the failure of the Fifth Circuit to require realistic economic evidence or analysis concerning the effects of the challenged conduct before the courts impose massive treble-damage liability. This Court has mandated that economic reality, not merely labels or mechanistic calculations, should govern antitrust decisions. If the simplistic approach of the court below is upheld in this massive litigation, it will pose an unreasonable threat to many other companies who may have to confront antitrust litigation.

SUMMARY OF ARGUMENT

I

In any commercial transaction the only economically meaningful price to a purchaser is the total cost to him of the product. Whether the cost is quoted as a single total price, or is broken down into components, the form in which the price is quoted is irrelevant to the decision whether to purchase the product. Even if the quoted price contains a standardized component, an agreement on that one component does not necessarily have any effect on the total price. Any effect that is felt does not necessarily correspond to the difference between the amount assigned to that standardized component and the actual cost of that component.

II

In a private treble damage action, the plaintiff must prove not only that the defendant engaged in anti-competitive conduct, but also that the defendant's behavior caused him actual antitrust injury. A presumption of

antitrust injury from proof of an agreement to quote price in terms which include a standardized component is inconsistent with this Court's holding that proof of a violation alone does not give rise to automatic damages under the Clayton Act. Proof of actual antitrust injury in a case which involves an agreement concerning one component of a multi-element price must demonstrate that the alleged agreement actually had an adverse effect on the total price of the product.

III

A. Damages in a price-fixing case are measured by the amount by which the plaintiff was overcharged. In a case where only one component of a multi-element price is alleged to have been affected by an illicit agreement, the amount of the overcharge should be measured by the difference between the total price actually paid for the product and the total "competitive" price; that is, the price that would have prevailed if there had been no interference with the free market. Only that measure of damages takes into account the adjustments in total price which may occur when a single component of price is alleged to have been stabilized.

B. In a price-fixing case, actual loss, if any, must be calculated by comparing the price paid by the plaintiff with the "competitive" price that would have prevailed, and the jury may not be permitted to award damages on the basis of a simplistic, but less accurate, damage formula.

C. The jury in an antitrust case may not render a damage verdict based on speculation or guesswork. The court of appeals erred in fashioning a special rule that allows plaintiffs in antitrust cases to establish their measure of damages with proof that "borders on the speculative."

D. The class action device may not be used to modify the substantive rights of parties to antitrust litigation. Any formula for the calculation of damages adopted in an antitrust class action must be based on reliable economic evidence and must reflect the actual damage caused by the violation. A desire to eliminate individual issues in a class action cannot justify adoption of a class-wide formula that alters the measure of damages which would govern in a suit by an individual plaintiff.

ARGUMENT

I. AN AGREEMENT TO FIX ONE COMPONENT OF PRICE DOES NOT NECESSARILY HAVE ANY EFFECT ON TOTAL PRICE.

A. As this case illustrates, the price charged by a manufacturer is a composite of many factors. For a product to be profitable, its price must be high enough to recoup an amount in excess of the costs of manufacturing and marketing it. Whether the manufacturer can set his price at such a level depends, of course, on the nature and amount of competition from similar or alternative products. The purchaser's primary interest in deciding on his source of supply of a substantially fungible product, and his volume of purchases is the total price that he must pay to that manufacturer or to his competitors.

The price quoted to a prospective purchaser may be cast in terms of a simple, delivered price which integrates all the components that the manufacturer must absorb and recover, or the price may break out several components specifically. For example, as in this case, the total price may separately state a basic charge for the product and a delivery or freight charge. Other pricing components also can be isolated for separate statement, such as packaging costs, advertising charges, warranty surcharges, discounts, and so forth.

What is critical to both parties, however, is the same: the total price to be paid. That figure controls the manufacturer's revenue and the purchaser's cost. An adjustment to the amount quoted for one ingredient in the total price is of no economic significance to either party if the manufacturer can offset a decrease in one component by an increased charge for another component while still making the total price attractive enough to the prospective purchaser to consummate the bargain. In that way, the manufacturer maximizes his revenue from the transaction, and the purchaser pays a total price that is, nevertheless, lower than competitive alternatives.

B. This is what petitioners say took place regularly in the Southern plywood industry. Their contention is expressly supported by the Ninth Circuit's evaluation in *Boise Cascade* of the market evidence before the Federal Trade Commission in the proceeding that paralleled this case. The courts below, however, manifested no sensitivity to the fundamental importance of insisting on solid evidence of the actual economic impact, if any, of the alleged conspiracy.

II. A FINDING OF TREBLE-DAMAGE LIABILITY REQUIRES PROOF OF ACTUAL FINANCIAL INJURY.

A. This case involves a claim for damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, which allows a plaintiff to recover treble damages if he is "injured in his business or property" by reason of any conduct forbidden by the antitrust laws. The essential predicate for treble-damage liability under Section 4 is injury in fact. As this Court has recently noted, Section 4 "focuses on tangible economic injury." *Blue Shield of Virginia v. McCready*, ___ U.S. ___, ___, 50 U.S.L.W. 4723, 4725 n.11 (No. 81-225, decided June 22, 1982).

In addressing this element of the case, the court below emphasized its view that an agreement concerning the form of quoting prices and the inclusion of one component in pricing constitutes a *per se* violation of Section 1 of the Sherman Act. *See* 655 F.2d at 632-33. The Fifth Circuit seemed satisfied with its view that, where plaintiffs have proven a *per se* violation, "it is not unlikely that plaintiffs also will be able to prove by a preponderance of the evidence that [they] . . . were injured." 655 F.2d at 635. The court evidently believed — erroneously — that attachment of the *per se* label virtually eliminated plaintiffs' burden of showing that the practice actually had an adverse effect on competitive prices paid by customers.

A conspiracy to fix an element of price may be subject to entry of an injunction under Section 16 of the Clayton Act, 15 U.S.C. § 26, without proof of specific financial damage to the plaintiff. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969). But the test in a treble damage case under Section 4 is different, and the Court has already recognized that a price-fixing conspiracy that is *per se* illegal nevertheless "may turn out to be harmless" when the plaintiff is claiming treble damages. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649 (1980).[4]

Even though an agreement among manufacturers to standardize the price quoted for one of the components of total price may be illegal under *Catalano, Inc. v. Target Sales, Inc., supra*, agreement on that one component would not necessarily have any effect on the total price, and there is no sound reason to assume that any effect on total price is automatically measured by the inflation of that single component. In the everyday world of business

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[4] *See generally* Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127 (1976).

bargaining, the competitively successful total price negotiated between buyer and seller may show no effect, or an effect of a different magnitude, resulting from any illicit agreement as to a component.

B. The only evidence of actual injury to which the court below alluded was the conclusory testimony of plaintiffs' economic expert witness that the overall prices charged must have been higher because of the inclusion of the "West Coast freight" term in the quotation of the total price. That conclusion was apparently drawn in the absence of any analysis of the "mill prices" charged by the plywood manufacturers or the total prices actually paid by purchasers. While such an assumption about the effect on price might be warranted in a simple overcharge case involving a fungible item and a market characterized by price stability, petitioners point to apparently unrebutted evidence showing vigorous competition in the "mill price" of plywood, with frequent fluctuations in that basic component of the delivered price.

Under a proper view of Section 4, a determination whether the conspiracy found by the jury injured a member of the purchasing class in this case would require an analysis of the effect of the conspiracy on the total price of plywood. It defies both logic and business experience to infer, from the existence of a standardized but historically understandable and at least initially lawful method of quoting prices, that the maintenance of that standardized component necessarily caused financial injury to all members of the class. Contrary to the approach followed below, the fact of antitrust injury must be proven by a demonstrable effect on price or price competition. *See Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477 (1977).

The Fifth Circuit's willingness in this case to create a virtual presumption of injury conflicts with this Court's

repeated rejection of arguments that the finding of an antitrust violation automatically "gives rise" to a treble-damage claim under Section 4 of the Clayton Act. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981); *see, e.g., Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc., supra,* 429 U.S. at 486-87; *cf. Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969). Acceptance of the deceptively simple testimony of the plaintiffs' economist ignored this Court's realistic assessment that " 'in the real economic world rather than an economist's hypothetical model,' the latter's drastic simplifications generally must be abandoned." *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 742 (1977), *quoting Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 493 (1968). Reliance on the conclusory statements of a single economic witness is unlikely to satisfy the burden of showing that the fact of injury is "certain." *J. Truett Payne Co. v. Chrysler Motors Corp., supra,* 451 U.S. at 567-68 n.5, *quoting Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 566 (1931).

In short, antitrust injury can only be proven by specific and reliable evidence about the actual economic effects of the challenged practice. The Fifth Circuit evidently decided to relax this requirement by indulging in an unwarranted assumption about the probable effect of concerted action. Especially when the stakes are as large as they are in a nation-wide class action, however, proof of the fact of injury should require something more solid than assumption and surmise.

III. THE MEASURE OF DAMAGES IN A CLASS ACTION, AS IN ALL PRIVATE ANTITRUST DAMAGE CASES, MUST REFLECT THE FINANCIAL INJURY ACTUALLY CAUSED BY THE VIOLATION.

Both the measure of damages adopted here and the definition of the plaintiffs' burden of proof on this issue depart from this Court's prior cases.

A. The measure of damages in a price-fixing case is the "amount of the overcharge." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972). The overcharge is measured by the difference between the price actually paid by the purchasers and the price they would have paid in the absence of the defendants' illegal conduct. *See, e.g., Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390 (1906); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Wall Products Co. v. National Gypsum Co.*, 357 F. Supp. 832, 844 (N.D. Cal. 1973); *In re Transit Company Tire Antitrust Litigation*, 67 F.R.D. 59, 77 (W.D. Mo. 1975).

In the relatively simple case where a defendant is found to have conspired to fix the total purchase price of an item purchased by a single plaintiff, the calculation of the amount of damages is relatively straightforward: In order to arrive at the amount necessary to remedy the plaintiff's injury, the amount of the "fixed" price is compared with the hypothetically constructed "competitive" price that the plaintiff would have paid. In a case where only one component of a multi-element price is alleged to have been agreed upon, the basic rule for measuring damages must remain the same, even if the inquiry involves a more complex analysis.

This Court has not previously had the occasion to define the analysis to be used in measuring damages in a case where only one element of a multi-element price is found to have been agreed upon. Nevertheless, prior decisions do point the way to the correct analysis. The relevant benchmark is the "price" of the product to the purchaser, and the price consists of the total cost to the

purchaser of acquiring the particular product. Thus, for example, in *Catalano, Inc. v. Target Sales, Inc., supra,* 446 U.S. at 645, the Court recognized that a seller's conspiratorial elimination of interest-free credit was likely to increase the effective total purchase price of the product. If other factors remained unchanged, the damage would be the added cost to the purchaser of obtaining credit. *See Fortner Enterprises, Inc. v. United States Steel Corp.,* 394 U.S. 495, 507 (1969).

The assumption that other factors affecting the total price remain unchanged, however, is the key to the propriety of using the effect of the conspiracy on a single price component as the measure of damages. Whether that assumption is sound in a particular market is a matter of proof. As we discussed above in Point I, no principle of economics and no experience in the commercial world justifies automatic indulgence of this assumption in a specific case.

B. In this case, the members of the plaintiff class purchased plywood at a price which included the manufacturers' costs of delivery. The total price included an amount assigned to freight, and all participants knew that this amount was a standardized figure. Negotiation for a more precise freight charge based on the actual transportation expense for each sale, however, would not necessarily have reduced the purchaser's total price by that difference. The appropriate measure of damages in a case of this sort, therefore, is the difference between the total price of plywood (including "West Coast freight") actually paid by purchasers and the total price of plywood (including freight) which would have prevailed in the absence of the conspiracy found by the jury. Only that measure of damages would assess the actual overcharge, if any, caused by the violation.

The only measure of damages submitted to the jury, however, was the one propounded by the court *sua sponte:* the total amount of the difference between the West Coast freight component of the delivered price and the actual point-to-point freight from the seller's place of business to the buyer's. *See* Jt. App. Appendix I. This formula ignored the undisputed facts that Southern plywood prices paid by customers were lower than Western plywood prices throughout the damage period — thus permitting the Southern manufacturers to increase their "mill prices" without losing sales — and that there was vigorous daily competition in "mill price" among the Southern plywood producers. The competition in adjusting mill prices, of course, resulted in competition in the *total* price actually paid. As the Ninth Circuit concluded in its decision holding that the method of quoting price at issue here did not violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, it was likely in these circumstances that each of the Southern plywood producers would have adjusted its "mill price" upwards if the standardized method of quoting freight charges had been discontinued. *Boise Cascade Corp. v. Federal Trade Commission, supra,* 637 F.2d at 580.

This economically sound analysis is consistent with this Court's recognition in *Catalano* that the elimination of one stated component of a total price may "ultimately lead in a competitive market to corresponding" adjustments in other components which leave the total price essentially unchanged. 446 U.S. at 649. This analysis realistically recognizes that a "wide range of factors influence a company's pricing policies" and that actual price levels would not necessarily reflect "the impact of a single change in the relevant conditions . . ." *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481, 492 (1968).

The court below, by contrast, upheld the use of a measure of damages that took into account only one component of the total price paid for plywood. That approach, however, is indistinguishable from the claim that a plaintiff in a Robinson-Patman Act case is entitled to "automatic damages" in the amount of the price discrimination, a view that the Court recently rejected in *J. Truett Payne Co. v. Chrysler Motors Corp., supra,* 451 U.S. at 561-63. The damage formula adopted by the trial court, and upheld below, is also similar to the damage formula rejected by the Seventh Circuit in *City of Mishawaka v. American Electric Power Co., Inc.,* 616 F.2d 976, 987 (7th Cir. 1980), *cert. denied,* 449 U.S. 976 (1980), where the court of appeals rejected as "totally without foundation" the trial court's assumption that the amount of an overcharge was the difference between the illegal rate charged to one customer and the lower rates charged to differently situated customers.

The formula used by the trial court here, like that in *City of Mishawaka,* is "recommended by its simplicity" but, just as in that case, "the computation of damages should not be expected to be quite that much easier than the rest of this case." *Id.* at 987. The formula for computing damages adopted by the trial court here would assess damages without requiring the plaintiffs to show what the "competitive" delivered price of plywood would have been during the damage period, and without considering the probable fluctations in the delivered prices from transaction to transaction involving different manufacturers and different purchasers.

Although there is a superficial allure to easy formulas, they are inconsistent with the compensatory purpose of the treble-damage remedy. *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc., supra,* 429 U.S. at 485-86. Congress' decision to provide for trebling of the damage award

depends on the plaintiff's first having proven, with a reasonable degree of certainty, the amount by which he was "actually" injured. *Id.* at 486. Sound antitrust principles, therefore, required the trial court to insist that the plaintiffs establish, with reliable economic evidence, the difference between the actual delivered prices and the "competitive" delivered prices upon which buyers and sellers would have agreed in the absence of the alleged conspiracy involving West Coast freight.

C. The court below approved a simplistic method of calculation because it believed that, once the plaintiffs had established the fact of damage, their burden of proving damages became "lighter" and that "proof of losses which border on the speculative is allowed in order to facilitate the policy of the antitrust laws." 655 F.2d at 635. The use of a measure of damages which "borders on the speculative," however, violates the rule established as long ago as *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946), that even in an antitrust case "the jury may not render a verdict based on speculation or guesswork."

In upholding this "lighter" burden of proof on the amount of damages, the court below failed to recognize the principle, implicit in this Court's prior cases, that the amount of proof necessary to support a " 'just and reasonable inference' " of damages, *Zenith Radio Corp. v. Hazeltine Research, Inc., supra*, 395 U.S. at 123, *quoting Bigelow v. RKO Pictures, Inc., supra*, 327 U.S. at 264, may vary with the violation alleged to have caused injury. In both *Bigelow* and *Zenith*, for example, the plaintiffs had been illegally excluded from the market. In market exclusion cases, damage issues "are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts;" thus, "in the absence of more precise proof," the factfinder may infer the amount of damage from proof of a violation and evidence of losses

not attributable to other causes. *Zenith Radio Corp. v. Hazeltine Research, Inc., supra,* 395 U.S. at 123-24.

An inference of the amount of damage may thus be based on evidence of otherwise unexplained losses coupled with a theory demonstrating that such losses were caused by the alleged violation. The court below confused permissible inferences about the cause of proven losses, allowed in *Bigelow* and *Zenith,* with impermissible speculation about unproven amounts of loss.

In a case such as this, where the actual loss — the alleged overcharge — can be assessed by comparing actual and "competitive" prices, the critical inquiry should have been on the determination of the competitive price. The plaintiffs' sole economic expert witness speculated that competition in the plywood industry "would have eliminated the ability of defendant plywood manufacturers to realize additional revenue in the amount of the phantom freight." 655 F.2d at 635. That testimony, however, went only to the fact of injury, not to the amount of damages. On the latter issue, the plaintiffs should have been required to produce evidence of what the competitive price would have been, *i.e.,* how much, if any, of the "additional revenue" realized under the "phantom freight" quotations would not have been realized if plywood manufacturers had used another method for quoting their prices.

D. The trial court here was apparently attempting to invent a damage formula which would make damages easily calculable in this nationwide class action. When a court has certified a massive class, consisting of hundreds or thousands of purchasers with claims against dozens of sellers, it is understandable why the plaintiffs or the court may strain to capitalize on the efficiencies of class treatment. As illustrated by this case, this effort frequently involves a search for formulas for assessing damages

which may be applied in a mechanical fashion and do not require a review of individual transactions. Such formulas are often advanced by class plaintiffs during the class certification stage of antitrust litigation in order to demonstrate that the predominance requirement of Fed.R.Civ.P. 23(b)(3) has been met.[5] Although the plaintiffs did not initially advance a formula at the class certification phase of this case, *see In re Plywood Antitrust Litigation, supra,* 76 F.R.D. at 585, there is a natural incentive for the trial court, once a class has been certified, to construct or utilize a damage formula that will ratify the propriety of class treatment.

As shown by this case, however, the use of a deceptively simple formula promotes the "efficiencies" of class treatment at the expense of economic reality and the substantive rights of the parties. Rule 23 of the Federal Rules of Civil Procedure, it must be remembered, is merely a procedural device allowing litigants to join their individual claims in one lawsuit, but the Rule may not be used to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072. *See, e.g., Zahn v. International Paper Co.,* 414 U.S. 291 (1973); *Snyder v. Harris,* 394 U.S. 332 (1969). As the Court recently noted, the "class action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' " *General Telephone Co. v. Falcon,* ___ U.S. ___, ___, 50 U.S.L.W. 4638, 4640 (No. 81-574, decided June 14, 1982), *quoting Califano v. Yamasaki,* 442 U.S. 682, 700-01 (1979).

Class treatment in no way transforms the substantive rules of law—including the law of damages—that govern

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[5] *See, e.g., Moore v. Southeast Toyota Distributors, Inc.,* 1982-2 Trade Cas. ¶ 64,743 at p. 71,604 (N.D. Ala. 1982) (denying class certification); *In re Fine Paper Antitrust Litigation,* 82 F.R.D. 143, 154 (E.D. Pa. 1979) (granting class certification); *In re Independent Gasoline Antitrust Litigation,* 79 F.R.D. 552, 561-62 (D. Md. 1978) (granting class certification).

any defendant's antitrust liability to any individual class member. In an individual action, a purchaser of plywood seeking treble damages under Section 4 of the Clayton Act would have been obliged to prove the "competitive" price at which he would have been able to purchase plywood in the absence of a conspiracy to quote the price in terms of West Coast freight. His burden on this fundamental predicate of a damage claim is in nowise rescinded by class-wide litigation of the existence of a price-fixing conspiracy.

Damage formulas like the one approved here abridge an antitrust defendant's substantive right to have the amount of damage attributable to his behavior calculated on the basis of realistic and reliable evidence. A decision to sweep hundreds of parties and thousands of transactions into a class action cannot serve as an excuse for changing the burden of proof that a single class member would have to shoulder in a separate suit. The courts below evidently forgot this simple but critical principle.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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August 1982.

Amicus Brief

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Nos. 81-1618 and 81-1619

In The

Supreme Court of the United States

October Term, 1982

WEYERHAEUSER COMPANY, *et al.*,

Petitioners,

v.

LYMAN LAMB COMPANY, *et al.*,

Respondents.

GEORGIA-PACIFIC CORPORATION,

Petitioner,

v.

LYMAN LAMB COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF CITY INVESTING COMPANY AND THE INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE URGING AFFIRMANCE AND PROPOSED BRIEF

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In The

Supreme Court of the United States

October Term, 1982

No. 81-1618

WEYERHAEUSER COMPANY, *et al.*,

Petitioners,

v.

LYMAN LAMB COMPANY, *et al.*,

Respondents.

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GEORGIA-PACIFIC CORPORATION,

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LYMAN LAMB COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION OF CITY INVESTING COMPANY AND THE INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE URGING AFFIRMANCE

City Investing Company ("City Investing") and The International Telephone and Telegraph Corporation ("ITT") move pursuant to Supreme Court Rule 36.3 for leave to file a brief in support of respondents as *amici curiae* urging affirmance of the judgment of the United States Court of Appeals for the Fifth Circuit in this case, *In Re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir.), *reh'g denied*, 663 F.2d 101 (5th Cir. 1981). This motion is necessary because City Investing and ITT have not been able to obtain the consent of all parties to the filing of the appended brief.

City Investing is a plaintiff, together with certain of its subsidiaries, in *City Investing Company, et al.* v. *Boise Cascade Corp.* (E.D. La. No. 77-1788). ITT holds the rights to recovery of its former Levitt & Sons subsidiaries in *LSI United Corp., et al.* v. *Boise Cascade Corp.* (E.D. La. No. 78-995). Both cases are "opt-out" actions which were consolidated with the class action for trial. The plaintiffs in the two cases are not parties in this Court because they did not move for summary judgment for the specific amounts of damages which they individually suffered. Since these plaintiffs intend to prove their damages in the district court in accordance with the verdict of the jury, City Investing and ITT have a financial interest in the sustaining of the judgment under review.

City Investing and ITT desire to present to this Court certain arguments which they believe will not be included in the brief of respondents and which they believe should be considered by this Court in deciding this case. These arguments relate to (a) the right of petitioners to raise any issue relating to the measure of damages submitted to the jury, and (b) certain aspects of petitioners' argument pertaining to the correct rule to be applied in determining damages in those instances where only one component of a price has been fixed.

For the foregoing reasons, City Investing and ITT request that this Court grant this motion for leave to file a brief as *amici curiae.*

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1982

No. 81-1618

WEYERHAEUSER COMPANY, *et al.*,
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GEORGIA-PACIFIC CORPORATION,
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LYMAN LAMB COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF CITY INVESTING COMPANY AND THE INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION AS AMICI CURIAE URGING AFFIRMANCE

QUESTIONS PRESENTED

City Investing Company and The International Telephone and Telegraph Corporation will address the following issues:

1. Whether, under the circumstances of this case and the Federal Rules of Civil Procedure, petitioners are precluded from now contending that it was incorrect to allow the jury to find the measure of damages set forth in interrogatories Nos. 2(b) and 4(b).

2. Whether the application of the law of price fixing to the facts of this case would, in any event, mandate the measure of damages submitted to the jury as interrogatories Nos. 2(b) and 4(b).

INTEREST OF THE AMICI CURIAE

City Investing Company ("City Investing") is a plaintiff, together with certain of its subsidiaries, in *City Investing Company, et al.* v. *Boise Cascade Corp.* (E.D. La. No. 77-1788). International Telephone and Telegraph Corporation ("ITT") holds the right to recovery of its former Levitt & Sons subsidiaries in *LSI United Corp., et al.* v. *Boise Cascade Corp.* (E.D. La. No. 78-995). Both cases are among the several "opt-out" actions which were consolidated with the class action for trial. The plaintiffs in the two cases are not parties in this Court because they did not move for summary judgment for the specific amounts of damages which they individually suffered. Since these plaintiffs intend to prove their damages in the district court in accordance with the verdict of the jury, City Investing and ITT have a direct interest in the sustaining of the judgment under review.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 49. Special Verdicts and Interrogatories.

(a) *Special Verdicts.* The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

* * *

Rule 51. Instructions to Jury: Objection.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

SUMMARY OF ARGUMENT

I

At trial, respondents introduced evidence to support their argument that the petitioners conspired to add an artificial freight charge to all their sales of plywood and that the measure of damages suffered by respondents resulting from such conspiracy was the excess of such artificial charge over the actual freight charge. Petitioners did not strongly contest the fact of the artificial charge. Rather, petitioners sought to convince the jury that (i) there was no conspiracy, and (ii) even if there were a conspiracy, respondents did not suffer any damage from the conspiracy because the laws of supply and demand determined the delivered price of the plywood. In other words, it made no difference whether petitioners fixed a portion of the price since competition in the "unfixed" portion of the price neutralized the adverse effect of the price fixing. Absent damages, petitioners argued, there would be no "impact" and hence no liability.

Petitioners adopted the above strategy to the exclusion of a presentation that would have admitted the possibility of damages to respondents and would have permitted the jury to find a measure of damages less than the difference between the artificial freight charge and the actual freight.

The jury found for respondents and determined the measure of damages to be the difference between the artificial freight and the actual freight. Petitioners now seek a second opportunity to try their case using the strategy that they previously avoided.

Petitioners are precluded from raising before this Court the issue of a new measure of damages because (i) they intended to (and in fact did) try the case on the basis that respondents suffered no damages whatsoever, (ii) they failed to introduce evidence to the effect that the measure of damages was less than the total amount of the difference between the artificial and actual freight, and (iii) they failed to request a jury instruction or a special interrogatory setting forth any measure of damages. Under the express provisions of Rules 49(a) and 51 of the Federal Rules of Civil Procedure, petitioners have waived their

right to have a different measure of damages submitted to the jury.

II

Petitioners argue in their briefs that damages must be determined on the basis of the overall delivered price of plywood rather than the fixed component of the price. That argument is incorrect. Damages should be based on the fixed component in order to be consistent with *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980). In *Catalano*, this Court held that an agreement to fix one element of a price is illegal *per se* even though it might be harmless as a matter of economic theory. To permit the measure of damages to take into account more than the fixed component of the price would in effect vitiate that decision. Moreover, in this case determining damages on the basis of the delivered price of the plywood would require economic testimony which is unduly hypothetical and speculative.

ARGUMENT

POINT I

UNDER THE CIRCUMSTANCES OF THIS CASE AND THE FEDERAL RULES OF CIVIL PROCEDURE, PETITIONERS ARE PRECLUDED FROM CONTENDING THAT IT WAS PROCEDURALLY INCORRECT TO ALLOW THE JURY TO FIND THE MEASURE OF DAMAGES SET FORTH IN INTERROGATORIES NOS. 2(b) AND 4(b)

A. *Introduction*

"It is axiomatic that a litigant cannot present arguments in this court which it did not present to the court below." *Wagner* v. *Retail Credit Co.*, 338 F.2d 598, 601 (7th Cir. 1964).[1] Yet,

[1] For applications of this principle, *see, e.g., McPhail* v. *Municipality of Culebra*, 598 F.2d 603, 607-08 (1st Cir. 1979); *Quast* v. *United States*, 428 F.2d 750, 753 (8th Cir. 1970); *United Steelworkers of America* v. *CCI Corp.*, 395 F.2d 529, 533 (10th Cir. 1968), *cert. denied*, 393 U.S. 1019 (1969).

this is precisely what petitioners are attempting to do in this Court and unsuccesfully attempted in the Court of Appeals.

The Court of Appeals recognized that petitioners tried their case on the basis of one theory and were, on appeal, attempting to obtain a chance to retry their case on a completely different theory:

> "Finally, defendants argue that it was reversible error for the district court even to submit the question of measure of damage, as distinct from that of fact of damage, to the jury. In its pretrial order of March 27, 1978, the district court advised all parties that trial was set for October 16, 1978, over one-half year later, 'upon all issues except the following, which are severed for subsequent trial as appropriate: (1) amount of damages sustained by individual plaintiffs, intervenors, and class members.' Plaintiffs went to trial contending that the alleged conspiracy caused them injury in the form of overcharges for phantom freight and underweights. Defendants tried to convince the jury that their pricing system caused no economic injury to anyone. The jury, agreeing with plaintiffs and disagreeing with defendants, returned its special verdict upholding plaintiffs' theory. Having failed to persuade the first jury that their challenged practices caused damage to no one, defendants now seek the opportunity to convince a different jury that some other measure of damages is appropriate." *In Re Plywood Antitrust Litigation,* 655 F.2d 627, 635-36 (5th Cir.), *reh'g denied,* 663 F.2d 101 (5th Cir. 1981) (emphasis omitted).

B. *Petitioners' Strategy At Trial Was To Avoid Any Suggestion That Respondents Were Damaged In Any Amount.*

At trial, petitioners' basic position was that the delivered price of plywood was determined by supply and demand and, therefore, there was no impact arising from any conspiracy to fix the freight portion of the price.[2] They contended that it was

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[2] *See, e.g.,* Tr. 104-08, 110, 120, 133-34 (opening statements); 2733-39, 2746-47, 2751-53, 2778-79, 2782-83 (lay testimony); 2879-2908 (expert testimony); 3313-20, 3346-47, 3357-61, 3378-79, 3407, 3416-18 (closing statements).

irrelevant that a portion of the price was fixed because the effect of supply and demand upon the unfixed portion corrected the overcharge resulting from the fixed portion. Faced with the choice between preserving the purity of their position and advancing an alternative contention as to the measure of damages, petitioners chose to avoid any middle ground in order to avoid giving an appearance to the jury that petitioners may have been conceding that respondents were damaged to any extent.

Respondents introduced evidence (including expert testimony) showing that respondents suffered financial damage as a result of petitioners' price fixing and that the measure of damages was the difference between the artificial freight charged to purchasers and the actual freight. Petitioners never attempted to counter respondents' evidence by introducing evidence tending to show that respondents were damaged to any extent. Instead, they adhered to their all-or-nothing strategy.

The jury did not accept petitioners' argument that there was no damage. The jury found that there was a price-fixing conspiracy, that there was impact and that the measure of damages was the entire amount of the excess freight charge. Petitioners now argue to this Court that that result was unfair. Four years after trial, they seek a second chance to prove a lesser measure of damages in which they can present what they now contend is a more reasonable position.

C. *Petitioners Knew Or Should Have Known That The Measure Of Damages Was Being Tried.*

Petitioners argue that they were ignorant of the fact that the measure of damages was being considered at trial. (Weyerhaeuser Br., Aug. 16, 1982, pp. 61-65; Georgia-Pacific Br., Aug. 16, 1982, p. 16 n.10). That contention is demonstrably incorrect and was resolved against petitioners in the courts below. (Because the finding against petitioners' contention is factual in nature and is supported by the record, this Court should not disturb it.) In any event, the most that can reason-

ably be alleged by petitioners is that trial counsel were mistaken. Any such mistake was of no consequence in light of their all-or-nothing strategy. Under no circumstances would petitioners have presented evidence that respondents were, in fact, injured—even to a limited extent.

As the Court of Appeals stated (see p. 6, *supra*), the district court's Pretrial Order No. 9 (J.A. 127) required *all issues* to be tried at the first trial, except for certain issues spelled out in the order. One such exception was the "*amount* of damages sustained by individual plaintiffs, intervenors and class members." (Pretrial Order No. 9, par. 10(d)(1)) (emphasis added). Petitioners apparently contend that the "amount" of damages suffered by individual purchasers is synonymous with the "measure" of damages, but these concepts are completely different.

The subjects of the trial were the common issues pertaining to the treble damage claims.[3] As noted above, the pretrial

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[3] Paragraph 10(d) of Pretrial Order No. 9 (J.A. 127) read in full as follows: "(d) *Trial and severance.* This litigation is set for trial to commence at 9:00 A.M., Monday, October 16, 1978, at the federal courthouse in New Orleans, Louisiana, upon all issues except the following, which are severed for subsequent trial as appropriate: (1) amount of damages sustained by individual plaintiffs, intervenors and class members (2) ability of individual plaintiffs, intervenors, and class members to claim benefits of tolling of the statute of limitations (but not issues as to concealment by defendants, which issues shall be presented at the initial trial) (3) claims by 'non-settling plaintiffs' against International Paper, Boise Cascade and Champion International as defendants (but not issues as claims against 'non-settling defendants' that they were members of a conspiracy with such three settling defendants, which issues shall be presented at the initial trial) (4) claims for attorneys fees. The evidence presented at the initial trial will also be considered as presented to the court on the injunctive features of the litigation, but the court will provide, after the initial trial, an opportunity for the parties to present additional evidence relevant to the injunctive features which was not relevant to the treble damage claims."

order provided that in subsequent proceedings each individual plaintiff would submit evidence of actual purchases of plywood to which the measure of damages determined at the trial would be applied. It would have been wasteful to defer the issue of the measure of damages to a second trial, since much of the evidence relating to liability is the same as that relating to the measure of damages. On the other hand, it makes perfect sense to isolate the determination of the "amount of damages sustained by individual plaintiffs." First, since the relevant evidence would consist largely of invoices and other documentary proof of purchases, it is likely that many of the individual amounts can be found by way of summary disposition—the way in which such amounts were found after trial in the cases of the respondents now before this Court.[4] Second, it would have been foolhardy to expend the great amount of time and effort required by every purchaser of plywood in the country to determine his purchases before the jury determined the definitive liability of petitioners.

Petitioners were well aware that the issue of the measure of damages was being tried in the first proceeding. The Court of Appeals correctly discerned that the contrary contention was being made solely to obtain a new trial:

> "Having failed to persuade the first jury that their challenged practices caused damage to no one, defendants now seek the opportunity to convince a different jury that some other measure of damages is appropriate." *In Re Plywood Antitrust Litigation, supra,* 655 F.2d at 636.

In any event, it is irrelevant whether petitioners were aware from the start that the issue of the measure of damages was to

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[4] In its Memorandum of Opinion denying petitioners' motion for judgment n.o.v. or for a new trial (Pet. J.A., App. C), the district court wrote in footnote 6: "It may well be that most, if not all, damage claims can be resolved by summary judgment after necessary discovery and data compilations have been completed."

be tried. They would not have changed (as they did not) their all-or-nothing strategy and thus would have tried the case the same way.[5]

D. ***Petitioners Failed To Request Instructions Or Interrogatories Embodying Any Intermediate Measure Of Damages Or To Request A Continuance To Introduce Additional Evidence On The Measure Of Damages.***

Georgia-Pacific complains at page 22 of its brief, in referring to the special interrogatories submitted to the jury, that "[o]nly two extreme alternatives were offered—either the 'freight gain' was the measure of damages, or the respondents suffered no damages at all." Yet this was precisely the battleground on which petitioners chose to fight. Respondents' evidence tended to establish that the measure of damages was equal to the excess of the artificial freight over the actual freight, and petitioners introduced evidence that respondents suffered no damages whatsoever.

Petitioners further complain that no instructions were given to the jury which would have allowed it to choose a position between the two extremes. *Id.* at 22-23. Yet no such instruction would have been appropriate since there was no evidence submitted either by respondents or petitioners that any such middle ground existed. Petitioners chose, for their own strategic reasons, not to make that argument or to introduce evidence on that subject. It is for that reason that petitioners did not object to the fact that there was no special interrogatory relating to a measure of damages based on some middle ground. As stated in Georgia-Pacific's brief at page 25, petitioners simply objected that there was "no evidence sufficient to support [respondents'] conclusion." That question,

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[5] See page 13, *infra*, for a discussion of the fact that petitioners had the opportunity to introduce additional evidence on the measure of damages after the district judge informed them that interrogatories on the measure of damages would be submitted to the jury.

however, was for the jury to consider and petitioners' only real complaint is that they did not like the result.[6]

Petitioners clearly intended and desired that the jury not be given any interrogatory relating to a measure of damages different from the interrogatories actually submitted, which inquired whether respondents were damaged to any extent and, if so, whether the measure of damages was the excess of the artificial freight over the actual freight. Thus, it was not error to frame interrogatories 2(b) and 4(b) as they were framed. They were based on the evidence.[7] Moreover, under Rule 49(a) of the Federal Rules of Civil Procedure, a party waives its right to trial by jury of an issue omitted from interrogatories unless it "demands its submission to the jury." If petitioners desired an interrogatory which set forth an intermediate measure of damages, under Rule 49(a) they should have requested one.[8] As an absolute minimum, petitioners were obligated to give the trial judge a general description of the requested interrogatory. *See, Huddleston* v. *Herman & MacLean,* 640 F.2d 534, 550 (5th Cir.), *modified in part on other grounds,* 650 F.2d 815 (5th Cir. 1981), *cert. granted,* 102 S.Ct. 1766 (1982).

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[6] This brief does not address the legal sufficiency of the evidence to support the verdict, which, we assume, will be fully demonstrated in respondents' brief on the merits.

[7] Since petitioners did not object to the form of the interrogatories as leading, they cannot raise such objection on appeal. *See, Charles Stores, Inc. v. Aetna Insurance Co.,* 490 F.2d 64, 67-68 (5th Cir. 1974). Moreover, such objection would properly have been overruled, since the phrasing of the interrogatories resulted from a proper summary of the evidence. Thus, petitioners' objection as to form (Weyerhaeuser Br., pp. 65-67) is both tardy and without merit.

[8] The Rule states that "If . . . the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury."

In fact, in light of their all-or-nothing strategy, the issues which petitioners were pressing were well covered by the following two interrogatories:

* * *

"2. (a) Did the use of 'West Coast freight' in the pricing of Southern pine plywood during the period from February 23, 1968, to December 31, 1973, cause financial damage to the purchasers of such plywood?

* * *

"4. (a) Did the use of 'standard weights' in the pricing of Western fir plywood during the period from February 23, 1968, to December 31, 1973, cause financial damage to the purchasers of such plywood?"

* * *

The fact that counsel's strategy was not successful should not be transformed into judicial error, plain or otherwise. Thus, it was not plain error to fail to charge that the measure of damages was the difference between the actual overall delivered price and some hypothetical competitive overall price. Petitioners' counsel did not request such a charge or object to the incorporation of their all-or-nothing approach in the charge proposed by the district judge because they were concerned that giving a charge authorizing the jury to find an intermediate measure of damages would have increased the risk that their strategy would fail. In addition, the giving of such a charge would have been erroneous because there was no evidence to support it. However expansively the plain error exception to Rule 51 of the Federal Rules of Civil Procedure may be viewed, that exception does not apply to alleged defects which do not frustrate the contentions of a party but instead are consistent with them or (as in this case) even implement them. *See, Herman* v. *Hess Oil Virgin Islands Corp.*, 524 F.2d 767, 772 (3d Cir. 1975).[9]

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[9] In the *Herman* case, the Third Circuit wrote that *McNello* v. *John B. Kelly, Inc.*, 283 F.2d 96 (3d Cir. 1960) (from which Georgia-Pacific quotes at page 25 of its brief), "does not require reversal for failure to charge the jury on a *legal theory* which was not requested by any of the parties." 524 F.2d at 772 n.15 (italics in original).

Petitioners' steadfast adherence to their strategy is also evidenced by the fact that they did not request a continuance. Four days before the jury was charged, petitioners' counsel were aware of the text of the interrogatories which the district judge proposed to submit to the jury. (*See*, Georgia-Pacific Br., p. 16 n.10; Tr. 3491). If counsel at that time desired submission of an interrogatory setting forth an intermediate measure of damages, they would have requested a continuance in order to present appropriate testimony. In two appellate briefs, they have stated that the evidence was available to them. In their joint main brief submitted to the Court of Appeals (p. 75), the three petitioners wrote:

> "Defendants likewise deferred making their case on the measure of damages, despite the fact that defense counsel had fully prepared that issue in connection with the Federal Trade Commission proceeding.*"
>
> * * *
>
> "* Defendants' expert witness here, Professor Steiner, had testified on the topic before the Commission, and counsel certainly would have taken him through the subject here if anybody had the remotest idea it was relevant to this stage of the proceedings. Defendants also had evidence, proffered later in opposition to plaintiffs' motions for summary judgment, that showed why freight differentials could not, to any imagination bounded by rationality, conceivably be the measure of damages. . . ." (footnote in original).

The absence of any application for a continuance was the result of a deliberate decision by experienced counsel to leave the case to the jury in the way it had been structured, *i.e.*, a total negation of damage in accordance with petitioners' strategy.

Petitioners would have this Court address the issue of the measure of damages in an abstract, theoretical setting. Petitioners have waived any right they might have had to submit

any aspect of that issue to the jury. They attempted to avoid any possibility that the jury would reach a middle ground between the polar positions of the two sides. Petitioners had their day in court, and this Court should not give petitioners an opportunity to change their trial strategy merely because that strategy did not produce the result for which they had hoped:

> "So long as we insist on maintaining all the rigors inherent in the contest aspect of the adversary system, we must be prepared to accept the consequences; one of these consequences is that each of the advocates must be relied upon to try his own case." *Lewis* v. *United States,* 381 F.2d 894, 895 (D.C. Cir. 1967) (concurring opinion of Burger, J.).

POINT II

UNDER THIS COURT'S *CATALANO* DECISION, THE ONLY PROPER MEASURE OF DAMAGES IS THE INFLATED AMOUNT OF THE FREIGHT CHARGE.

Petitioners acknowledge "that a conspiracy to fix one element or term of a price is a *per se* violation of the Sherman Act." (Georgia-Pacific brief, Aug. 16, 1982, p. 18). Yet this principle is fundamentally inconsistent with petitioners' contention made at trial that the laws of supply and demand operated on the "non-fixed" portion of the price of plywood (and hence on the delivered price) and, therefore, there was no damage to respondents resulting from petitioners' price-fixing. This principle is likewise inconsistent with the disguised "rule of reason" argument petitioners are making in this Court that to establish damages the jury should have looked to the overall price of plywood rather than the fixed portion of the price.

In *Catalano, Inc.* v. *Target Sales, Inc.,* 446 U.S. 643 (1980), this Court refused to accept the argument that fixing a portion of a price would not necessarily result in damage to purchasers of a product, and recognized that establishing a *per se* rule of liability for fixing a single component of a delivered

price "avoids the necessity for an incredibly complicated and prolonged economic investigation . . . —an inquiry so often wholly fruitless when undertaken." *Id.* at 646, n.9 (quoting *Northern Pac. R. Co.* v. *United States,* 356 U.S. 1, 5 (1958)). It is inherently inconsistent to conclude that fixing an element of a price results automatically in a violation of the Sherman Act and at the same time to require that damages be measured only in relation to the delivered price of the product. As a theoretical matter, it may be true in limited circumstances that competition on the non-fixed portion of a price may result in a delivered price being the same as if no portion of the price were fixed, but that is precisely the argument rejected by this Court in *Catalano.* Since it is a violation of the Sherman Act to fix a portion of a price, both the impact and measure of damages must be measured in terms of the fixed portion of the price. Otherwise, the rule of *Catalano* would be of no practical effect.

Georgia-Pacific at page 18 of its brief quotes two statements in *Catalano* referring to the fact that the fixing of a price may turn out to be "harmless" and may ultimately lead to an offsetting reduction in the price of the product.[10] It treats those statements as a virtual endorsement by this Court of the supposedly innocuous nature of an agreement fixing a portion of the price of a product. In so doing, Georgia-Pacific takes those sentences totally out of context. The point this Court was making was that even though fixing a portion of the price may arguably be harmless as a theoretical matter of economics, it is still a *per se* violation of the Sherman Act to fix an element of a price. In other words, in *Catalano* this Court answered petitioners' contention that they should not be liable for damages related solely to the fixed portion of the price of plywood because the overall delivered price *may* theoretically

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[10] " '[I]t may be that the elimination of a practice of giving variable discounts will ultimately lead in a competitive market to corresponding decreases in the invoice price [*i.e.,* purchase price].' *Id.* at 648-49. Indeed, the Court explicitly noted the possibility that an agreement to fix one element of a price 'may turn out to be harmless in a particular set of circumstances. . . .' *Id.* at 649."

not have been significantly affected. This Court in *Catalano* suggested that the reasonable and practical inference where companies conspire to fix an element of a price is that substantial injury is caused to purchasers from the artificial charge. This Court apparently viewed that result as being more realistic in light of the conspiratorial behavior and intent of the price fixers than the alternative possibility that the non-fixed portion of the price may be adjusted downward to undo the effects of the price fixing.[11] *See,* 446 U.S. at 649.

Petitoners are attempting to confuse theoretical rules of economics with rules of law. Regardless of those theoretical economic rules, this Court has held that it is a *per se* violation of the antitrust laws for industry members to fix any portion of the price of a product. Such companies should be deterred from engaging in such unlawful conduct, and no rule of law should be established by this Court that would decrease that deterrence. Permitting price fixers to present to a trier of fact "incredibly complicated" (*Catalano, supra,* 446 U.S. at 646, n.9) and often totally unintelligible evidence that as a matter of

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[11] The following example from the record shows that the more realistic view of the inflated charge for freight was that it was part of a conspiracy to raise the delivered price of plywood by at least the same amount. When United States Plywood Corporation was negotiating with Kirby Lumber Company to purchase a substantial portion of the plywood to be produced by Kirby in order to supplement U.S. Plywood's own production and other purchases, U.S. Plywood's vice president wrote:

> ". . . Another important factor, I think, Kirby, is that we would assure you, as I stated, of top market prices at all times, and this is extremely important from the standpoint of market stabilization, especially when we are beginning to experience price cut[ting] on pine in some of our markets not too far away from where present production is being concentrated.
>
> "One of our principal objectives in trying to line up outside production is to do everything possible to stabilize prices, especially in those markets close to the plant. We would guarantee you too, as I said, an average freight pickup of at least 70 cents. . . ." Tr. 2256; PX-377.

economics no damage was caused because the "unfixed" portion of the price was "appropriately adjusted" would do just that. Since it is illegal to fix any portion of a price, to be an effective deterrent the measure of damages must be limited to an analysis of the effect of that illegal conduct on the portion of the price which was fixed.[12]

The appropriateness of this analysis of the *Catalano* decision is reinforced by the specific nature of the present case. There is simply no practical way to determine the prices of plywood from 1968 through 1973 had petitioners' conspiracy not existed. The conspiracy commenced at least with the establishment of the southern plywood industry, included every producer of plywood and was nationwide. No comparisons or analogies can be made to the prices charged by other producers of plywood in other areas under other circumstances. The conspirators imposed a purely artificial charge for fictional services on top of their charges for products and services actually provided. (*See* respondents' expert testimony at Tr. 2352-55, 2358-2360, 2368-69). The conspiratorial scheme distorted normal market forces so pervasively[13] that any analysis of how a competitive plywood industry would have operated would be purely hypothetical and speculative and would require the use of unreliable and theoretical economic concepts of the nature rejected by this Court. Even petitioners'

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[12] It is no answer to say that the injunctive remedy would still be available. At best, that remedy would affect future conduct after discovery by the plaintiff of the illegal activity. The plaintiff seeking damages could be dragged through the courts for years, only to obtain a verdict that the price-fixing was merely an academic exercise by the conspirators.

[13] For example, one effect of petitioners' conspiracy was the protection of old mills in the Northwest and the suppression of opportunities otherwise available to mills and potential mills in the Southeast, through the allocation of sales areas nationally. The southern mills had an artificial incentive (the profit after deducting actual freight costs from the fictitious "West Coast freight" from the Portland basing point) to ship eastward, while reserving the West, Midwest and Northeast to the western mills. (*See*, Tr. 1467-68, 2213A-2214, 2362-63, 3021, 3026-27; *see also*, 3250).

expert testified that his analysis involved selecting some variables and rejecting others in order to achieve a similarity between the actual prices for plywood and the prices which would have been generated by a competitive industry (Tr. 3010, 3172-73).

The evidence at a new trial on the measure of damages would be the opinions of economic experts for petitioners and respondents which have already been given to the jury and considered by them. Virtually the only additional evidence that petitioners could introduce would be "incredibly complicated" explanations of the various assumptions used by these experts. This would involve unrealistic economic analyses of the type rejected in *Catalano* and earlier rejected as unsuited to antitrust cases in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). In *Illinois Brick*, this Court declared:

> "[A]s the *Hanover Shoe* Court observed, 392 U.S., at 493, 88 S.Ct., at 2231, 'in the real economic world rather than an economist's hypothetical model,' the latter's drastic simplifications generally must be abandoned. Overcharged direct purchasers often sell in imperfectly competitive markets. They often compete with other sellers that have not been subject to the overcharge; and their pricing policies often cannot be explained solely by the convenient assumption of profit maximization. As we concluded in *Hanover Shoe*, 392 U.S., at 492, 88 S.Ct., at 2231, attention to 'sound laws of economics' can only heighten the awareness of the difficulties and uncertainties involved in determining how the relevant market variables would have behaved had there been no overcharge." 431 U.S. at 742-43 (footnotes omitted).

The only realistic and comprehensible method for determining damages in a case involving the fixing of one element of the price of a product is to focus on that element which is fixed. To focus on the unfixed portion of the price is unproductive and is in direct conflict with this Court's decision in *Catalano*.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Nos. 81-1618 and 81-1619

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WEYERHAEUSER COMPANY, *ET AL.*,

Petitioners,

v.

LYMAN LAMB COMPANY, *ET AL.*,

Respondents.

GEORGIA-PACIFIC CORPORATION,

Petitioner,

v.

LYMAN LAMB COMPANY, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF THE NATIONAL LUMBER AND BUILDING MATERIAL DEALERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND PROPOSED BRIEF

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IN THE

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OCTOBER TERM, 1981

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF THE NATIONAL LUMBER AND BUILDING MATERIAL DEALERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Supreme Court Rule 36.3, the National Lumber and Building Material Dealers Association (hereafter "NLBMDA"), an Illinois nonprofit corporation,

hereby moves for leave to file a brief as *amicus curiae* in support of Respondents in this matter.

NLBMDA is a national organization comprised of 26 state and regional association affiliates. Through these federated organizations, NLBMDA represents nearly 11,000 individual lumber and building material dealers across the country.

Many of these dealers are members of the respondent class in this proceeding. Thus, the potential loss to the individual companies should this Court reverse the decision of the United States Court of Appeals for the Fifth Circuit, *In re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981), is of major concern to the Association. Additionally, the Association has interest in the decision herein as there has been much similar litigation in recent years involving products purchased by building material dealers; while the decision hereby would obviously not impact these past cases, it would establish a precedent to deter future violators.

Finally, the Association believes that it would be helpful for this Court to have the views of an organization representing dealers, since the Petitioners have asserted that because some individual dealers did not complain about the challenged pricing practices, no damages should be found.

For these reasons, we request that the Court grant the motion of the National Lumber and Building Material

Dealers Association for leave to file a brief as *amicus curiae.*

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE NATIONAL LUMBER AND BUILDING MATERIAL DEALERS ASSOCIATION AS *AMICUS CURIAE*

The National Lumber and Building Material Dealers Association (hereinafter "NLBMDA"), as *amicus curiae*, urges this Court not to reverse the judgment of the

United States Court of Appeals for the Fifth Circuit entered on September 8, 1981, *In re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981).

INTEREST OF THE *AMICUS CURIAE*

NLBMDA is a nonprofit organization, organized and operating under the laws of the State of Illinois, with headquarters in Washington, D.C. It is a federation of 26 state and regional associations and, through them, represents nearly 11,000 lumber and building material dealers across the country.

The vast majority of these dealers are small, family-owned businesses which purchase and sell plywood and other building supplies and construction material to contractors and the general public. Thus, the decision of the Fifth Circuit, if reversed, would deprive these dealers of the recovery to which both courts below found they were entitled.

More importantly, however, NLBMDA and its dealer members are concerned that this Court not misconstrue or misread the economic realities of the marketplace in considering the matter before it.

STATEMENT

The United States Court of Appeals for the Fifth Circuit has upheld a jury verdict which found that three major plywood companies, the Petitioners in this matter, had violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by conspiring to fix the price of plywood. This conspiracy involved overcharges by using "West Coast freight" in the South and "standard weight" in the West in the price to the building material dealer purchaser.

The Court of Appeals also upheld the method by which the trial jury assessed damages against the plywood companies. That method set damages on the amount of the difference between "West Coast freight" and actual freight in the South, and freight based on standard weights compared with actual weights in the West.

On a petition for rehearing *en banc*, not one member of the Court of Appeals requested that the court be polled on the question.

The primary purpose of the NLBMDA submitting its views on this matter is to counter arguments by Petitioners as to the lack of buyer objection to this practice and to urge this Court not to reverse the Court of Appeals' ruling on the measure of damages, since the calculation is one which is proper in light of the economics surrounding the purchase of plywood.

SUMMARY OF ARGUMENT

Failure of purchasers to object to an illegal pricing conspiracy is immaterial, though in this case there was objection on the part of some members of Respondent class.

ARGUMENT

Petitioners Weyerhaeuser Company and Willamette Industries, Inc. rely in their brief on the opinion of the United States Court of Appeals for the Ninth Circuit in *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980), and particularly on that portion of the opinion in which the Court found a "complete lack of buyer testimony objecting to the practice." *Id.* at 580.

There are several fallacies in Petitioners' argument.

First, merely because a buyer either fails to testify about a practice or fails to object to it at the time the practice is used upon him, does not raise the level of the practice to some protected status if it is otherwise unlawful. Petitioners would have this court believe that the lack of objection on the part of building material purchasers to the use of the "West Coast freight" and standard weight in the pricing of plywood is the equivalent of stating that it had no effect on competition and should therefore be condoned.

Such an argument clearly ignores the weight of more than 80 years of opinions from this court. As early as 1899, in *United States v. Addyston Pipe & Steel Co.*, 175 U.S. 211 (1899), Judge Taft held that a price-fixing agreement was illegal under the Sherman Act without regard to the reasonableness of the prices fixed. In *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), this Court unequivocally held price fixing to be a *per se* violation of the Sherman Act. By 1940, in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), this Court declared that all price fixing agreements are "beyond the pale." *Id.* at 221.

Further, if Petitioners are attempting to equate non-objection with acceptance and participation in an illegal practice, this Court long ago rejected the application of the common-law doctrine of *in pari delicto* to antitrust cases. *Perma Life Mufflers, Inc. et al. v. International Parts Corp. et al.*, 392 U.S. 134 (1968).

Thus, there can be no doubt that price fixing is unlawful whether the prices fixed are reasonable or unreasonable, whether there is actual or only threatened harm to the competitive system and, most importantly, whether any of the victims of the price fixing object to the practice or not.

Second, the plain fact is that there was objection on the part of purchasers.

Banner Builders Supply of Pensacola, Florida, registered an objection to the use of "West Coast freight" for Southern pine and plywood because they were attempting to discover any freight advantage which might be enjoyed by producers of this product (Plaintiff's trial exhibits 1 and 2).

National Homes of Thomson, Georgia, called Georgia-Pacific Corporation specifically to "complain about pricing of Southern pine plywood" (Plaintiff's trial exhibit 44).

Morsches Lumber, Inc., of Columbia City, Indiana, complained in writing to Weyerhaeuser Company about that corporation's refusal to honor price quotations, only to be told that the reason was the use of "West Coast freight" for pricing purposes (Plaintiff's trial exhibit 233).

(It should be noted that Banner Builders Supply is a member of the Florida Lumber and Building Material Dealers Association and that Morsches Lumber, Inc. is a member of the Indiana Lumber and Builders Supply Association. Both associations are federated members of the *amicus curiae.*)

Additionally, Petitioners were on notice of objection on the part of many bulding material dealers even before the Federal Trade Commission filed its complaint against seven plywood manufacturers, the results of which litigation the Petitioners are herein using. On February 23, 1972, 37 building material dealers, all located in Louisiana, filed the first class action suit against all known plywood manufacturers, styled *Gabriel Building Supply Co., Inc. v. Agnew Plywood et al.*, Civil Action No. 72-522 (U.S.D.C., E.D. La., New Orleans Div.).

Subsequent class action suits were brought and consolidated into this action.

Thus, it is clear that, notwithstanding Petitioners' arguments, there was objection on the part of purchasers to the practice which the jury in this case has found to be illegal.

Finally, in the event that this Court deems objection to the illegal price-fixing conspiracy to be pertinent, the National Lumber and Building Material Dealers Association herewith states its objection to the practice.

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit should not be reversed.

Respectfully submitted,

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Nos. 81-1618 and 81-1619

In the Supreme Court of the United States

OCTOBER TERM, 1982

WEYERHAEUSER COMPANY and
WILLAMETTE INDUSTRIES, INC., PETITIONERS

v.

LYMAN LAMB COMPANY, ET AL.

GEORGIA-PACIFIC CORPORATION, PETITIONER

v.

LYMAN LAMB COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the district court correctly instructed the jury on the types of evidence from which it could find a conspiracy in violation of the Sherman Act, and whether the evidence supported the jury's determination that a conspiracy existed.

2. Whether the district court correctly instructed the jury on the standard for estimating damages in a private antitrust action, and whether the evidence supported the jury's determination of the measure of damages.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1618

WEYERHAEUSER COMPANY and
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GEORGIA-PACIFIC CORPORATION, PETITIONER

v.

LYMAN LAMB COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States has primary responsibility for enforcing the federal antitrust laws. It frequently has appeared before this Court as amicus curiae in private treble damage actions brought under those laws. See, *e.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330 (1979).

STATEMENT

Based on a special jury verdict, petitioners were assessed treble damage penalties under Section 4 of the Clayton Act, 15 U.S.C. 15, for conspiring to raise the price of softwood plywood. The jury found that, by uniformly adding "west coast freight," rather than actual

freight, to the mill price, and by pricing freight on the basis of "standardized" rather than actual weights, petitioners injured respondents in the amount of the difference between the cost of west coast freight and actual freight, and the cost of standardized weights and actual weights.

1. Prior to 1964, almost all softwood plywood was made from timber grown in the Pacific northwest. Most manufacturers were located in that region as well (81-1619 Pet. 5; Pet. App. D-3). Prices were quoted in the form of a "mill" or "base" price, plus "west coast freight," *i.e.*, the cost of rail freight from Portland, Oregon, to the point of destination (81-1619 Pet. 5; Pet. App. D-4). Industry members also quoted freight prices based on estimated or "standard" weights, rather than on the actual weight of the plywood (Br. Opp. 2-3).

By 1963 technological advances made it possible to manufacture softwood plywood from southern pine. In December 1963, Georgia-Pacific, a northwestern plywood producer, opened the first plywood mill in the South (Br. Opp. 1; 81-1619 Pet. 5). It priced its plywood by quoting a mill price, plus "west coast" freight. By 1968 there were more than 25 southern plywood mills, and by 1974 there were more than 50 (Tr. 2451, 2889-2890). As those mills opened, southern producers continued to price on the basis of mill price plus west coast freight (Br. Opp. 2; Tr. 1994, 2123-2124).

2. From 1972 to 1974, numerous private antitrust actions were filed against plywood manufacturers, including petitioners (Pet. App. A-2; D-1). While the claims against the other manufacturers were settled, petitioners proceeded to trial (Pet. App. A-3). The trial judge ordered a bifurcated trial, stating that the first trial would cover all issues except those specifically severed for subsequent trial. One of the issues so severed was the " 'amount of damages sustained by individual plaintiffs, intervenors, and class members' " (*id.* at A-11; emphasis omitted).

Following a month-long trial (Pet. App. A-3), the jury returned a special verdict finding that petitioners had conspired to use "west coast freight" in the pricing of southern plywood, and "standard weights" in the pricing of western plywood, during the period from February 1968 to December 1973 (Pet. App. I-1 to I-2); that use of those pricing practices caused financial injury to respondents (*id.* at I-2 to I-3); and that the measure of damages was equal to the amount by which the west coast freight charge exceeded the actual freight charge on southern plywood, and the amount by which the standard weight charge exceeded the actual weight charge on western plywood (*ibid.*).

3. The district court denied defense motions for a new trial and judgment n.o.v., and entered judgment on the special verdict (Pet. App. C-2 to C-7). The court found that "the evidence with respect to the findings of a conspiracy [was] * * * sufficient not merely to create a jury issue but also to cause it, like the jury, to find that there was a conspiracy" (*id.* at C-3). While the court did "not necessarily agree[]" (*id.* at C-4) with the jury's measure of damages, it nevertheless adopted that computation in granting summary judgment in favor of respondents (Pet. App. A-4 & n.1).

4. The court of appeals affirmed in all respects. It found sufficient evidence to suport the jury's finding of a conspiracy to fix prices (Pet. App. A-5 to A-9). It also held that respondents had proven that petitioners' conspiracy injured them in their business or property (*id.* at A-9 to A-10). Finally, the court held that the district court properly submitted the measure of damages issue to the jury, and that the evidence was sufficient to support the damages determination rendered by the jury (*id.* at A-10 to A-12).

SUMMARY OF ARGUMENT

1. In a suit brought under Section 1 of the Sherman Act, 15 U.S.C. 1, the plaintiffs may prove the existence of a horizontal price fixing conspiracy in a number of ways.

They may present direct or circumstantial evidence showing the occurrence of collusive acts. Special problems arise, however, when plaintiffs seek to prove illegal collusion by presenting evidence of conscious parallel pricing. Evidence of parallel pricing, standing alone, is ambiguous: such behavior is equally indicative of competition and collusion. Consequently, trial courts should not allow proof of parallel conduct to go before the jury unless the plaintiffs proffer additional evidence that logically tends to show that the conduct is not of a kind likely to occur if the defendants acted as independent competitors.

It also is essential to instruct the jury that consciously parallel behavior alone is an insufficient basis for inferring agreement. The jury should be told that it may not consider parallel behavior as evidence of collusion unless it finds from other evidence that the parallel conduct would be contrary to the interests of the defendants if they acted independently.

Although the trial court did not give the precise cautionary instruction that we believe proper, the omission on this record was harmless error. The instructions, when read as a whole, clearly required the jury to find "agreement." And, in addressing parallel pricing practices, the instructions focused the jury's attention on the central question whether petitioners adopted those practices unilaterally because it was in their "best economic interest" to do so "in the light of the economic industry conditions." Moreover, the jury's finding of antitrust injury shows that it considered these questions and resolved them against petitioners. The jury's finding of injury rests on its determination that, absent agreement, petitioners would have adopted different pricing practices. Thus, viewing the instructions as a whole and in light of the entire record, there is no substantial likelihood that the jury's verdict rested on mere parallel conduct without the presence of actual collusion.

2. The jury's resolution of the damages issue in this case should be set aside. The trial court was required to instruct the jury that the proper measure of damages

is the difference between the price respondents paid for plywood and the price they would have paid in a market free of the alleged anticompetitive restraint. The court did not give this or any other instruction to guide the jury in measuring damages, and, beyond this, it used a single-option interrogatory on the measure of damages issue that may have misled the jury.

In affirming the measure of damages adopted by the jury, the court of appeals simply relied on the jury's supposed resolution of conflicting evidence. That rationale, however, fails to address the inadequacy of the trial court's charge, and ignores serious shortcomings in the record. Although the correct measure of damages requires a comparison of the price paid with the price that would have prevailed absent the alleged restraint, no evidence was presented showing the probable price of plywood absent collusion. In these circumstances, the computation adopted by the jury is not "a just and reasonable estimate of the damage based on relevant data." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY SUSTAINED THE JURY'S DETERMINATION THAT PETITIONERS ENGAGED IN A PRICE FIXING CONSPIRACY

A. Jury Instructions Should Provide Meaningful Guidance In Assessing The Probative Value Of Circumstantial Evidence Of Price Fixing

Section 1 of the Sherman Act, 15 U.S.C. 1, provides that "[e]very contract, combination * * * or conspiracy, in restraint of trade or commerce * * * is * * * illegal." Decisions of this Court construing Section 1 have long recognized that "conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done * * *." *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U.S. 600, 612 (1914). In other words, "[i]t is not necessary to find

an express agreement in order to find a conspiracy" (*United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948)), and "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement" (*Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 540 (1954); *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969)). The present case requires the Court to consider what types of circumstantial evidence suffice to demonstrate the existence of a conspiracy in violation of Section 1, and what kind of guidance the district court should give the jury to assure an accurate resolution of that important issue. More specifically, this case raises the question whether, and under what circumstances, juries may consider parallel pricing behavior as evidence of conduct illegal under Section 1.

1. Caution must be exercised in determining what kinds of evidence support an inference of collusion. In a horizontal price-fixing case, relevant evidence tending to support the allegations of the complaint must logically tend to show that the defendants departed from independent decision-making and adopted a concerted pricing strategy. Under competitive conditions, each seller seeks to maximize his profits through unilateral decisions concerning output and price that are rendered in light of prevailing market conditions. By contrast, when collusion displaces competition, sellers seek to maximize their profits through a collective determination concerning output and price, which departs from the pattern dictated by individual self-interest.[1]

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[1] A seller in a perfectly competitive market maximizes profits by continuing to manufacture his product until marginal cost rises to the level of the prevailing market price. Restriction of output and elevation of price above the prevailing level would be contrary to the economic self-interest of the individual seller. By contrast, under collusion, a group of sellers with aggregated market power will maximize their profits by restricting output and elevating price above that prevailing under competition. See G. Stigler, *The Theory*

There are several types of evidence that a plaintiff might adduce to establish that the defendants engaged in collusion rather than independent action. The plaintiff might, of course, present "testimonial" or "direct" evidence that the defendants conspired to restrict output and elevate price. Such testimony, whether of a confessed co-conspirator, or an observer of a critical meeting, is among the most persuasive forms of evidence of collusion.[2]

Circumstantial evidence also may provide support for the allegation that the defendants departed from individual profit-maximizing behavior and entered into a collusive profit-maximizing arrangement.[3] Such evidence may consist of concrete manifestations of discussions or meetings, including memoranda, letters, or diary entries, which, although not explicitly revealing that an agreement was reached, nonetheless support that inference. To be logically probative, these writings must show more than mere meetings or conversations. Rather, they must tend to show that an attempt was made to replace independent behavior with collaborative behavior.[4]

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of Price 176-178, 230-232 (3d ed. 1966). Thus, the economic self-interest of the seller is pursued in a different manner under conditions of collusion and competition.

[2] Evidence in the form of directly incriminating documents also may be available. However, this is not common. See *Esco Corp.* v. *United States*, 340 F.2d 1000, 1006 (9th Cir. 1965): "Nor are we so naive as to believe that a formal signed-and-sealed contract or written resolution would conceivably be adopted at a meeting of price-fixing conspirators in this day and age."

[3] There is no bright line distinction between direct and circumstantial evidence. Weak direct evidence (such as testimony from a witness of doubtful veracity) may be less probative than strong circumstantial evidence. "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Michalic* v. *Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960).

[4] For example, discussions among competitors concerning future prices, output, avoidance of "price cutting," the need to preserve price "stability," and the like, suggest illegal collusion. By contrast, evidence showing mere "opportunities" to conspire (*i.e.*, con-

Each of these categories of evidence provides either direct or indirect support for an allegation of price fixing. All such evidence tends to show that the defendants departed from unilateral action and pursued pricing and output strategies that would maximize profits through collective action.

2. Frequently, as in the present case, plaintiffs proffer evidence of parallel conduct by defendants to support their allegations of price fixing. However, parallel pricing behavior, even when accompanied by complete knowledge on the part of industry members, is utterly ambiguous as an indicium of conspiracy. Standing alone, conscious parallel pricing is equally consistent with collusion and competition. See Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 659 (1962):

> Even the fact that competitors have knowingly charged identical prices is a neutral fact in the absence of evidence which would lead one to expect that the prices would have been different if truly independent decisions had been made. Identical prices may be consistent with independent competitive decisions. A large number of producers of a standardized commodity selling under stable market conditions might be expected to charge the same price, a price set not by agreement but by market conditions. None

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tacts providing a potential occasion for collusion) is not probative. Many businessmen function in an environment in which meetings, trade association gatherings, and social activities bring them into contact with competitors. To base a finding of collusion on this kind of evidence would condemn the innocent along with the guilty (see, *e.g.*, *Weit* v. *Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 462-463 & n.17 (7th Cir. 1981), cert. denied, No. 81-152 (Mar. 1, 1982)), and would chill the participation of businessmen in various activities found by this Court to be useful in a competitive market (see, *e.g.*, *Maple Flooring Manufacturers Association* v. *United States*, 268 U.S. 563, 582-584 (1925)).

> could charge more and make any sales, and there would be no point in charging less because, under competitive assumptions, each could sell at the established market price all that his costs made it profitable to sell.[5]

It is crucial, therefore, that courts adjudicating antitrust complaints take steps that enable them to distinguish parallel conduct that is probative of agreement from that which is not.

Evidence of parallel pricing behavior may mislead a jury possessing little sophistication concerning the operation of economic markets. Indeed, the danger of the jury's being misled may be the greatest when the evidence intuitively seems to indicate collusion—for example, evidence of a virtually simultaneous, identical price increase. What to the untrained observer bears the most obvious marks of agreement may, in fact, be perfectly consistent with competitive market performance. Consequently, we believe that it is necessary for district courts to be vigilant to assure that illegality is not ascribed to parallel behavior that manifests nothing more than the workings of a competitive market. If the plaintiff relies solely on consciously parallel behavior and does not tender additional evidence to show that such behavior differs from that which would be expected under competitive conditions, his complaint should be dismissed on motion for summary judgment. See *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 287-288 (1968) (sustaining summary judgment

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[5] Under conditions of perfect competition, each seller has such a small share of the market that he cannot exert a perceptible influence on price and all sellers have knowledge of current price conditions. In this situation, a single price will prevail. See C. Ferguson & J. Gould, *Microeconomic Theory* 222-225 (4th ed. 1975): "The critical ingredient * * * is * * * the assumption that each economic agent acts as if prices are given." The authors add that "[c]onsumers, producers and resource owners must possess perfect knowledge if a market is to be perfectly competitive" (*id.* at 224). Accord, G. Stigler, *The Organization of Industry* 5-7 (1968).

where "the inference of conspiracy sought to be drawn from [the defendants'] 'parallel refusal to deal' does not logically follow" (footnote omitted)).[6]

By the same token, the plaintiff should be allowed to introduce evidence of parallel conduct to supplement other evidence of agreement, direct or circumstantial, only if he is prepared to show that the parallel conduct was inconsistent with the defendants' independent competitive interests and, hence, unlikely to occur absent collusion.[7] The court should review the sufficiency of the plaintiff's showing on this issue. If it determines at the end of trial that the plaintiff's proof is insufficient to support a jury finding that the parallel conduct differed from conduct to be expected if each firm acted in its own self-interest as an independent competitor, it should direct the jury to disregard the parallel conduct in determining whether there was an agreement. Moreover, if the court determines that the remaining evidence, considered alone, is insufficient to allow the jury to find collusion, the court should direct a verdict for the defendants.[8]

Even when the court permits the case to go to the jury, it should give instructions that caution the jury that consciously parallel behavior alone is an insufficient basis on which to find conspiracy. The jury should be instructed

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[6] See also Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, *supra*, 75 Harv. L. Rev. at 658:

> Thus, conscious parallelism is not even evidence of agreement unless there are some other facts indicating that * * * the decisions were consistent with the individual self-interest of those concerned only if they all decided the same way.

[7] Ordinarily, such a showing would take the form of expert testimony that the parallel conduct was of a kind unlikely to occur in a competitive market because, absent collusion, it would be contrary to the self-interest of the firms involved.

[8] See *Report of the Attorney General's National Committee to Study the Antitrust Laws* 39-40 (1955): "'Conscious parallelism' is not a blanket equivalent of conspiracy. * * * Proof of agreement, expressed or implied, is still indispensable to the establishment of a conspiracy under the antitrust laws."

that such behavior, whether viewed by itself or in conjunction with other evidence, supports an inference of agreement only if the jury finds that the behavior is inconsistent with individual self-interest and thus unlikely to occur without collusion.

3. Although this Court has not previously delineated guidelines for jury charges in price fixing cases, the principles outlined above are reflected in prior decisions of the Court. Thus, in *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, *supra*, 346 U.S. at 541, this Court rejected an inference of conspiracy where the plaintiff proved only parallel conduct, and the defendants showed that their behavior agreed with individual self-interest.[9] This Court reached the same result in *First National Bank* v. *Cities Service Corp.*, *supra*, 391 U.S. at 287, where an inference of collusion did not "logically follow" from the mere existence of parallel behavior.[10]

The decisions of the courts of appeals reflect a similar sensitivity to the limited relevance of parallel behavior. See, e.g., *Venzie Corp.* v. *United States Mineral Products Co.*, 521 F.2d 1309, 1314 (3d Cir. 1975), holding that mere parallel conduct, absent evidence of acts contrary to individual self-interest, is not probative of collusion. Accord, *Proctor* v. *State Farm Mutual Automobile Insurance*

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[9] The Court explained (346 U.S. at 541) that " 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."

[10] Conversely, in cases where conspiracy has been inferred from parallel behavior, the behavior at issue conflicted with the hypothesis that each defendant rendered an independent business decision. In *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939), each defendant responded in an identical way after receiving a letter demanding anticompetitive action. Each defendant knew that its rivals received the same demand. The parallel responses were preceded by no general change in market conditions, and the actions of the individual firms would have conflicted with their own self-interest without assurance of identical actions from their rivals. See *id.* at 222-225. Similarly, in *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946), this Court sustained a finding of conspiracy based on a complex series of parallel actions that defied explanation as rational individual responses to market conditions. See *id.* at 801-803, 804-808.

Co., 675 F.2d 308, 327-335 (D.C. Cir. 1982), petition for cert. pending, No. 81-2379 (filed Jun. 28, 1982); *Weit* v. *Continental Illinois National Bank & Trust Co.*, *supra*, 641 F.2d at 462-465.

B. The District Court's Charge To The Jury In This Case Did Not Constitute Reversible Error

The district court's charge to the jury in this case did not give precise focus to the principles we have discussed above. The trial judge should have instructed the jury that it could not consider parallel pricing to be probative evidence unless it first determined that the conduct differed from conduct to be expected from firms acting unilaterally in their own self-interest. Nonetheless, we believe that, when viewed in its entirety, the trial judge's instructions on the price fixing issue were not so deficient as to require reversal of the jury's finding of liability.

The trial judge charged the jury that petitioners' actions would violate the Sherman Act only "if they were done as a result of contract, combination or conspiracy" (Tr. 3526-3527), and thus were the product of "agreement" (Tr. 3528, 3530-3533, 3593-3594, 3596-3597). The court made clear that parallel pricing is not itself improper. It emphasized that, "[i]n and of itself, a manufacturer may on its own adopt practices that are followed and used by other people in the industry" (Tr. 3528). It also explained that a manufacturer may use a pricing formula, such as the west coast basing point formula, "even if other manufacturers are following the same or similar practices, and even if it knows the other manufacturers are following those practices" (Tr. 3527-3528, 3539, 3597).

The court went on to explain (Tr. 3539-3540) that "where * * * similar practices are being followed by many manufacturers, with each being aware that the other is doing so, that is a part of the circumstantial evidence from which a jury may, with other evidence in the case, look to see whether this was so because of some agreement to do so." The court added (Tr. 3540) that:

> [i]n considering whether or not to draw any such inference, you would want to consider whether the different manufacturers adopting such practices were doing so because of their own independent best judgment as to what was in their best economic interest to do so, independent of any commitment or agreement from other people to do the same thing. In deciding this issue and in deciding what inference, if any, to draw, you would want to consider whether the practices that were being employed made sense in the light of the economic industry conditions and whether or not the benefits from those practices * * * were or were not dependent on other people, other manufacturers doing the same thing.

The court also explained, with respect to basing point pricing, that (Tr. 3541) "the mere fact * * * that some practice was being followed that was artificial or arbitrary or unduly complicated * * * would not mean that it was a product of a conspiracy. * * * These would simply be factors that you would take into consideration in the totality of the evidence in deciding whether or not to draw the inference that these matters came about not as a result of the decision by the individual companies that it was in their best interest to do so, but whether they did so because of some expressed or implied commitment and agreement from others to do likewise."

Finally, the court made clear (Tr. 3536) that communications among industry members, including exchanges of pricing information, are not "in and of themselves" illegal and might in fact "be vehicles for fostering competition." The court cautioned the jury that attendance at trade association meetings and participation in trade discussions do not signify "that any particular agreement was or was not entered." Thus, "[t]here is nothing wrong in and of itself" when such contacts occur (Tr. 3537-3538).

We believe that this charge, read as whole, is unlikely to have led the jury to give weight to petitioners' parallel pricing conduct without having concluded that the parallel conduct differed from conduct to be expected under competitive conditions. The charge focused the jury, al-

though not in what we regard as the ideal way, on the critical question whether the challenged conduct was consistent with the hypothesis that each competitor acted unilaterally. The court instructed the jury (Tr. 3540) that it "would want to consider" whether the practices in question were in petitioners' "best economic interest" absent an agreement, and directed the jury to inquire whether the practices "made sense in the light of the economic industry conditions." Those instructions conveyed the message that agreement may be inferred from parallel conduct only when the parallel behavior differs from that to be expected when each firm pursues its own economic interest on a unilateral basis.[11] Our view on this point is reinforced by the jury's finding of antitrust injury. The finding of antitrust injury necessarily incorporates the conclusion that petitioners' practices departed from what would have occurred under competitive conditions.

In this context, the jury could not have been substantially affected by the district court's failure to provide the more specific guidance we have discussed.[12] Accordingly, the district court's charge to the jury does not constitute reversible error in the circumstances of this case. See *Hamling* v. *United States*, 418 U.S. 87, 107-108 (1974); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 462-463 (1978); *United States* v. *Park*, 421 U.S. 658, 674-675 (1975); 28 U.S.C. 2111.[13]

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[11] Petitioners' expert witness testified that the southern plywood manufacturers behaved as would be expected in a fully competitive market (Tr. 2881-2893). The jury did not, however, credit that testimony. As discussed on pages 18-20, *infra*, respondents introduced evidence tending to show that petitioners' conduct was inexplicable if each firm acted on a unilateral basis.

[12] The cautionary instruction we advocate had not, of course, appeared with specificity in any decision of this Court or any court of appeals prior to the time of the trial herein. And, although petitioners sought instructions different from those actually rendered, they did not request the type of instruction we have described. See Fed. R. Civ. P. 51.

[13] Petitioners also argue (81-1619 Pet. 13) that the district court failed adequately to inform the jury that parallel pricing and

C. The Jury's Verdict Was Supported By Legally Sufficient Evidence

Petitioners also assert (81-1619 Pet. 13-14; 81-1618 Pet. 13) that the court of appeals improperly upheld the finding of conspiracy because the record discloses only conscious parallel pricing and opportunities to conspire. In so arguing, petitioners mischaracterize the nature and quantity of the evidence against them, and disregard legal principles governing appellate review of jury verdicts.

Following a month long trial, and after receiving voluminous evidence concerning petitioners' actions, the jury found by a preponderance of the evidence that a price fixing conspiracy existed. In rejecting petitioners' motions for judgment notwithstanding the verdict, the district court made an identical finding (Pet. App. C-3; footnote omitted):

> The defendants vigorously challenge the sufficiency of the evidence with respect to the findings of a conspiracy. The court disagrees, believing the evidence sufficient not merely to create a jury issue but also to cause it, like the jury, to find that there was a conspiracy and that the three defendants were parties to that conspiracy.

The court of appeals sustained the district court's assessment of the evidence: "We find that there is substantial evidence * * * from which a reasonable jury, both directly and circumstantially, could find the existence of a conspiracy to fix prices" (Pet. App. A-6).

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opportunities to conspire do not, even in combination, permit an inference of collusion. However, that objection was never urged in the district court, and, in any event, the district court's charge did make clear that neither parallel pricing nor opportunities to conspire would support an inference of collusion (see pages 12-13, *supra*). Indeed, the district court's charge on this point is remarkably similar to that tendered by petitioners. See Defendants' Tendered Jury Instructions Nos. 68, 75 and 78 (*In re Pywood Antitrust Litigation*, M.D.L. Docket No. 159 (E.D. La.)). Beyond this, petitioners did not raise this challenge to the jury charge in the court of appeals (see Defendant-Appellants' Br. 60-63), and it may not be raised in this Court for the first time. *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958).

In attempting now to relitigate their evidentiary claims, petitioners assume a weighty burden. In the present posture of this case, the reviewing court is required to "view the evidence in the light most favorable to [respondents] and to give [them] the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962) (footnote omitted). An appellate tribunal cannot reweigh the evidence because "[i]ssues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury." *Grunning* v. *Cooley*, 281 U.S. 90, 94 (1930).

These general principles of appellate review apply with particular strictness when a case reaches this Court, which does not sit to determine the facts underlying legal controversies. See *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980): "In view of our settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred, we decline to review these and other findings of fact petitioner argues were clearly erroneous." There is no basis for departing from that rule here. The record in this case contains sufficient evidence from which the jury could infer that petitioners entered into a price-fixing conspiracy. We briefly summarize some of that inculpatory evidence below.

1. As the court of appeals noted, respondents presented evidence showing a large number of meetings and discussions between competing companies, which could be viewed as showing that petitioners availed themselves of the opportunity to adopt an agreed upon pricing strategy. See Pet App. A-6 to A-8. Much of this evidence reveals an intimate knowledge by petitioners of their competitors' pricing behavior and plans, as well as direct communications among the competitors concerning pricing practices.

Some of the evidence discloses intercompany contacts concerning the west coast pricing system. For example,

in 1972, a Georgia-Pacific representative, investigating "a rumor that some manufacturer was deviating from the industry's practice of west-coast freight pricing" (Pet. App. A-7), asked another employee if he knew "anything about this." The latter responded, " 'Negative. * * * Big W[eyerhaeuser] is now encouraging their most distant truck customers to make mill pick-ups in return for an allowance. They thus are dropping their truck customers in poor freight gain areas" (*id.* at A-8).

The evidence also showed intercompany communications monitoring the continued use of the "industry's practice of west-coast freight pricing." For example, a representative of U.S. Plywood stated in a 1973 memorandum that "[w]e have just been advised by [Georgia-Pacific] that they intend to begin testing FOB mill pricing at their southern plants this week." He promised to keep "close tabs" on this disturbing development "since we will be in the same boat before too long." PX 342; Tr. 1905-1906. Other competitors discussed industry pricing practices with equal directness and stressed the need to avoid "price cutting." For example, the vice president of U.S. Plywood wrote to the president of Kirby Lumber Co., a new entrant in the southern plywood market, and extolled the benefits of "market stabilization" through intercompany cooperation:

> Another important factor, I think, * * * is that we would assure you, as I stated, of top market prices at all times, and this is extremely important from the standpoint of market stabilization, especially when we are beginning to experience price cutting on pine in some of our markets not too far away from where present production is being concentrated.
>
> One of our principal objectives in trying to line up outside production is to do everything possible to stabilize prices, especially in those markets close to the plant. We would guarantee you too, as I said, an average freight pickup of at least 70¢.

PX 377; Tr. 2256. Communications such as these—in which competitors discuss their pricing plans, monitor

those plans, and express an intent to restrain "price cutting"—are types of indirect evidence that may support an inference of collusion.[14]

2. Beyond this, respondents presented evidence to show, not merely uniform adherence to a particular price, but uniform adherence to a pricing formula in circumstances where, according to respondents' expert witness, adherence to such a formula established collusion rather than independent action.

a. The evidence adduced at trial proved industry-wide maintenance of a pricing formula resting on a distant basing point.[15] Commentators have observed that basing-point pricing may, in some circumstances, be a "tell-tale symptom" of collusion. R. Posner & F. Easterbrook, *Antitrust* 346 (1981).[16] A basing-point system inherently

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[14] *C-O-Two Fire Equipment Co.* v. *United States*, 197 F.2d 489, 493 (9th Cir.), cert. denied, 344 U.S. 892 (1952).

[15] Basing-point pricing is "a system under which sellers, in quoting a delivered price (that is, a price that includes the transportation of the goods to the buyer) compute the transportation component of the price not from the seller's factory but from a standard point that may be far away from it. * * * Where the basing point is nearer the customer than the seller's factory is, the freight cost included in the price is less than the actual freight cost; the result is 'freight absorption' by the seller. Where the basing point is farther from the customer than the seller's factory is, the seller's actual freight cost is less than the cost he adds on to the factory price in computing the delivered price; the extra freight cost is referred to as 'phantom freight.' Basing-point pricing involves both freight absorption and phantom freight." R. Posner, *Antitrust Law: An Economic Perspective* 70 (1976).

[16] In some situations, sellers have an incentive jointly to adopt a basing point formula to restrain price cutting and divide up business more evenly despite regional fluctuations in demand. See R. Posner, *supra*, at 70; R. Posner & F. Easterbrook, *supra*, at 345-346; P. Areeda, *Antitrust Analysis* 308 (2d ed. 1974); C. Kaysen, *Basing Point Pricing and Public Policy*, *reprinted in* R. Hefelbower & G. Stocking, *Readings in Industrial Organization and Public Policy* 153, 158 (1958); F. Scherer, *Industrial Market Structure and Economic Performance* 329 (2d ed. 1980); G. Stigler, *A Theory of Delivered Price Systems*, *reprinted in* G. Stigler, *The Organization of*

involves the charging of "phantom freight" to nearby customers, a form of overcharge that competition might be expected to eliminate. See R. Posner, *supra*, at 70-71.[17] While basing-point pricing is not always inconsistent with competition, respondents presented expert testimony supporting their allegation that such a pricing formula would not have been maintained in the plywood industry absent collusion (Tr. 2357-2359, 2471-2473).[18]

b. Industry-wide adherence to a single basing-point price system also may result in some firms acting in a manner that would be contrary to their individual

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Industry 147, 148 (1968); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, *supra*, 75 Harv. L. Rev. at 675; F. Machlup, *The Basing-Point System* 135 (1949).

[17] In a competitive market, independent sellers, seeking to expand their market shares, would have a strong incentive to reduce the prices at which they sell goods to purchasers. Accordingly, each seller would use the locational advantage he has in relation to purchasers in close proximity to his plant by charging a price too low to cover transportation from the next most proximate seller. The most proximate seller, in theory, captures rents corresponding to his own locational advantage. Thus, local sellers would attempt to undersell their more distant rivals, who bear higher freight costs, and buyers would purchase the product from the sellers nearby at the lowest available price.

[18] Pricing based on west coast transportation costs could have arisen without collusion during the early years of the southern plywood industry, which did not then have sufficient capacity to satisfy local demand and which competed with west coast suppliers to meet that demand. Over time, however, southern plants expanded their capacity to satisfy local needs (Tr. 2471-2473). Under competitive conditions, this would have had the effect of driving higher-priced distant producers from the local market. That could have occurred either through elimination of phantom freight and abandonment of the basing-point formula, or through progressive reductions in the quoted base price. It could be expected that the obsolete basing-point formula eventually would be abandoned even in the latter case. Respondents contended that adherence to the basing-point system, long after development of full capacity in the southern plywood industry, supported the inference of collusion (Tr. 2471-2473).

interests if they acted without collusion. Some sellers are located closer than others to particular customers. When transportation cost is substantial relative to product cost, this location advantage is a significant competitive benefit that firms, acting unilaterally and in their own self interest, would seek to exploit. Employment of a uniform basing-point system requires sellers to sacrifice that locational advantage by charging "phantom freight." On the basis of the expert testimony before it, the jury could infer that such behavior would not persist in the plywood market absent collusion—*i.e.*, that under competitive conditions, southern plywood sellers seeking to expand their sales would have reduced freight charges to nearby purchasers until the "phantom" cost was eliminated. Based on respondents' evidence, the jury could have concluded that adherence to an artificial basing-point system by all sellers would only be rational if those sellers who sacrificed locational advantages were assured by agreement of some recompense in the form of enhanced general price stability.[19]

3. In the face of evidence showing repeated conversations among competitors concerning pricing practices, coupled with uniform adherence to a pricing formula that an expert witness characterized as economically irrational absent collusion, petitioners could be expected to provide testimony to dispel the inference of collusion. However, none of the persons responsible for the challenged pricing decisions took the witness stand or attempted to explain the pricing practices in question.[20]

As this Court explained in *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 225-226 (1939):

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[19] Consistent with this rationale, respondents' expert witness testified that the west coast basing-point system would not have survived in the plywood industry without some form of agreement (Tr. 2358-2359, 2361-2363).

[20] When respondents offered certain deposition testimony from petitioners' officers and employees, petitioners supplemented their proffers. But they did not themselves offer testimony from corporate officials responsible for pricing to explain the unusual pricing practices in question or to negate the inference of agreement.

> Th[e] inference [of concerted action] was supported and strengthened when the [defendants], with like unanimity, failed to tender the testimony, at their command, of any officer or agent of a [defendant] who knew, or was in a position to know, whether in fact an agreement had been reached among them for concerted action. When the proof supported, as we think it did, the inference of such concert, the burden rested on [defendants] of going forward with the evidence to explain away or contradict it. * * * The failure under the circumstances to call as witnesses those officers who did have authority to act for the [defendants] and who were in a position to know whether they had acted in pursuance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to [defendants]. * * * Silence then becomes evidence of the most convincing character.

The same analysis applies here. Because the record supports an inference of conspiracy, petitioners' failure to present rebuttal testimony from their officers or employees itself is a factor the jury properly could consider as reinforcing the inference of agreement.

In short, petitioners incorrectly characterize this case as one in which the court of appeals affirmed a finding of agreement solely on the basis of parallel conduct and opportunities to conspire.[21] As we have explained,

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[21] We also disagree with petitioners' claim that the Fifth Circuit's opinion conflicts with that of the Ninth Circuit in *Boise Cascade Corp.* v. *FTC*, 637 F.2d 573 (1980), in which the court refused to enforce an FTC order aimed at practices in the same industry. In the present case, the Fifth Circuit reviewed a jury finding of conspiracy under the Sherman Act. The Ninth Circuit, however, had before it an FTC opinion holding that the Commission, under Section 5 of the Federal Trade Commission Act, 15 U.S.C. (& Supp. IV) 45, could forbid unilateral but parallel conduct that had the effect of stabilizing prices. In addition, one of the Ninth Circuit's criticisms of the adequacy of the FTC's case concerned the agency's failure to present expert testimony on the economics of the plywood industry. Respondents presented such testimony supporting their allegations that the challenged practices were caused by a conspiracy. The two decisions thus focused on different

respondents adduced substantial inculpatory evidence tending to prove the allegation of collusion. Petitioners apparently believe that the jury drew the wrong inference from this record. But in our legal system that determination is committed to the finder of fact, and not appellate courts.

II. THE COURT OF APPEALS INCORRECTLY SUSTAINED THE JURY'S DETERMINATION OF THE MEASURE OF DAMAGES

A. The Jury's Damages Determination Rests On Erroneous Instructions And An Inadequate Evidentiary Record

A private antitrust plaintiff must establish three elements to recover damages: "(1) a violation of the antitrust laws, (2) cognizable injury attributable to the violation, and (3) at least the approximate amount of damages." *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 560 (1981); see also *id.* at 568. As explained above, respondents have adduced sufficient evidence to sustain the jury's finding of conspiracy in violation of the antitrust laws. That same evidence also suffices to support the jury's finding that the conspiracy resulted in cognizable injury to respondents. However, neither the district court's instructions nor the evidence presented by respondents was sufficient to support the jury's determination of the measure of damages.

The measure of damages in an antitrust action rests on a "comparison of * * * prices * * * as affected by the conspiracy, with what they would have been in its absence under freely competitive conditions." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); accord, *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, 396 (1906); *Keogh* v. *Chicago & Northwestern Ry.*, 260 U.S. 156, 160 (1922). Once a plaintiff establishes the fact of antitrust injury, however, its burden of proving the extent of that injury "is to some extent lightened." *J. Truett Payne Co.* v. *Chrysler Motors*

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legal issues arising in different evidentiary settings; they do not reflect disagreement as to relevant legal standards.

Corp., supra, 451 U.S. at 568. Indeed, as long as the fact of damage is certain, "the fact that its extent is uncertain does not prevent a recovery." *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 566 (1931); *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, *supra*, 451 U.S. at 567-568 n.5.[22] Yet, while precision is not required, "the jury may not render a verdict based on speculation or guesswork." *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, *supra*, 282 U.S. at 563; *Bigelow* v. *RKO Radio Pictures, Inc.*, *supra*, 327 U.S. at 264. It is required to "make a just and reasonable estimate of the damage based on relevant data." *Bigelow* v. *RKO Radio Pictures, Inc.*, *supra*, 327 U.S. at 264; *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123-124 (1969). "The essential thing is that the available data be used in rational ways which warrant confidence that the damage figure reached is, in fact, a reasonable if imprecise estimate, rather than a speculative guess." *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173, 1189 (D.C. Cir. 1978) (quoting L. Sullivan, *Antitrust* 787 (1977)).

The damage determination in this case falls far short of these standards. The district court's instructions completely failed to enlighten the jury as to the principles it should apply in measuring respondents' damages and, contrary to the apparent conclusion of the court of appeals (Pet. App. A-11), the evidence presented by respondents was insufficient to permit the jury to "make a just and reasonable estimate of the damage" (*Bigelow* v. *RKO Radio Pictures, Inc.*, *supra*, 327 U.S. at 264).

1. The district court instructed the jury that there are "two elements [to] the charge or charges that the Plaintiffs make" (Tr. 3523). Respondents were required to

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[22] This principle is founded on the premise that "where the defendant by his own wrong has prevented a more precise computation * * * [he] shall bear the risk of the uncertainty which his own wrong has created." *Bigelow* v. *RKO Radio Pictures, Inc.*, *supra*, 327 U.S. at 264-265; *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, *supra*, 282 U.S. at 565; *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927).

prove that petitioners' pricing practices "were the result of a contract, combination, [or] conspiracy between two or more manufacturers" (*id.* at 3523-3524). Respondents also were required to demonstrate that such practices "caused financial damage to the purchasers of * * * plywood" (*id.* at 3524; see also *id.* at 3517, 3552). To this extent, the charge was correct. Conspicuously missing from the court's instructions, however, was any mention of the third basic element of a private antitrust case: the standard the jury should apply in measuring "the approximate amount of damages" (*J. Truett Payne Co.* v. *Chrysler Motors Corp.*, *supra*, 451 U.S. at 560).

Despite the omission of any instruction regarding the proper measure of damages, the court submitted special interrogatories that required a "yes" or "no" response to questions asking whether respondents' damages were "equal to the amount" by which the freight charges for standard weights and west coast freight exceeded the charges for actual weights and freight (Pet. App. I-2 to I-3). The court stated that the questions were "easy to understand and really don't require that much explanation" (Tr. 3552-3553). Indeed, the only instructions accompanying the interrogatories were the court's observations that "[t]he Plaintiffs are asking that you answer yes to [those] question[s]," while the "Defendants are saying * * * you shouldn't have to get to [those] question[s] at all, but they are also saying answer no if you do get to [them]" (Tr. 3555; see also *id.* at 3556).[23] The jury answered both questions in the affirmative, thus establishing the measure of respondents' damages.

The district court's charge regarding the measure of damages clearly was inadequate. Indeed, the court's instructions provided virtually no guidance on this issue.

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[23] Petitioners objected to the damage interrogatories on two grounds: (1) that the measure of damages had been reserved for subsequent trial, and (2) that there was insufficient evidence to support the measure of damages posed by the interrogatories because respondents presented no evidence showing what a competitive price would have been absent the conspiracy (Tr. 3572-3574).

The court did not explain to the jury that the measure of damages in an antitrust action is the difference between the price paid and the price that would have prevailed absent the alleged restraint. *Bigelow* v. *RKO Radio Pictures, Inc.*, *supra*, 327 U.S. at 264. The instructions, moreover, failed to advise the jury of possible alternatives to the single damage computation proposed by the interrogatories.[24] The jury, confronted with what it deemed to be persuasive evidence of a conspiracy in restraint of trade, might well have believed that unless it answered "yes" to the quantum of damages interrogatories, respondents' damages claims would be defeated entirely.[25] In these circumstances, the jury should have been instructed regarding the range of allowable judgment in computing damages, particularly in view of the trial court's later assertion that it may well have computed damages differently had it been the finder of fact.[26] Thus, the damage award in this case is fatally flawed. The jury could not properly have determined the extent of respondents' injuries because the legal yardstick for measuring those injuries was never revealed to it.[27]

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[24] As discussed on pages 26-27, *infra*, the evidence did not establish that the price of plywood in a competitive market would have been reduced by the entire amount of the "underweights" and "phantom freight." The jury nevertheless was presented with "all or nothing" interrogatories that failed to inform it that respondents' damages could be fixed at some other level.

[25] One wonders what the district court would have done if the measure of damages interrogatories had been answered in the negative. Respondents presumably would not have been precluded from proving some other measure of damages at a subsequent damages trial.

[26] In entering judgment on the jury verdict, the trial court stated (Pet. App. C-4) that it did "not necessarily agree[]" with the jury's findings regarding the amount of damages.

[27] See *Dugas* v. *Kansas City Southern Ry. Lines*, 473 F.2d 821, 828 (5th Cir.), cert. denied, 414 U.S. 823 (1973):

> The defendant may pay damages, but it is entitled to have a jury measure those damages according to clear, legally correct,

2. The court of appeals affirmed this damage determination on the theory that the jury simply weighed the evidence presented by the parties and "chose to accept the testimony of plaintiffs' economist and to reject the contrary testimony of defendants' economist" (Pet. App. A-11). That conclusion, however, not only ignores the fundamental inadequacy of the district court's instructions regarding the measure of damages, but also disregards serious shortcomings in the expert testimony itself. The error underlying the measure of damages issue is more fundamental than a mere dispute over the relative credibility of expert testimony. In our view, the testimony in question is insufficient as a matter of law to support the damage computation adopted by the jury.

The court of appeals stated that "[i]n reaching a decision on plaintiff's theory of injury, the jury necessarily had to resolve plaintiffs' claim that defendant manufacturers' addition of west coast freight to the selling price of southern pine plywood shipped from southern mills, and their use of standard weights in the pricing of western fir plywood, increased those prices" (Pet. App. A-12). We agree. But it does not follow that the prices were increased in the exact amount of the freight and weight differentials, as the jury's verdict purported to find.

As we have explained, the proper measure of damages is the difference between the price respondents paid and the price that would have prevailed without the anticompetitive restraint. Neither respondents' nor petitioners' expert witnesses provided evidence of what that competitive price would be.[28] Contrary to the court of appeals'

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plainly enunciated standards, an obligation which the trial court no doubt intended but did not accomplish.

[28] Both expert witnesses agreed that, even in a competitive market, southern producers could be expected to charge higher west coast prices, including west coast freight, when the southern mills first opened. Tr. 2404, 2910. This would occur because west coast suppliers were still needed to meet most of the southern market demand.

apparent belief (Pet. App. A-11), respondents' expert witness did not testify that, absent collusion, competitive prices in the plywood industry would have been decreased by the entire amount of "phantom freight" and "underweights." Respondents' expert merely asserted that, in a competitive market, locational advantages "would be passed along in the form of lower prices" (Tr. 2411-2412), with prices "mov[ing] down toward the actual cost involved, the actual cost of production, and the actual cost of transportation to the market" (Tr. 2468). The expert did not testify as to what production costs were, or what the delivered price would have been in a competitive market. Moreover, he did not specify or even estimate the time at which supra-competitive prices should have been totally eliminated.[29] Thus, while the jury reasonably could rely on respondents' expert testimony to support a finding of injury in fact, that testimony provided no basis for the ultimate determination of the measure of damages.

The delivered price of plywood is made up of two elements: a "base" or "mill" price, and a freight charge. If, but only if, southern producers were adding west coast freight to the same base price that would have prevailed in a competitive market would the difference between west coast and actual freight be an accurate measure of damages. Because there was no evidence presented below—from expert witnesses or other sources—as to what the base price of plywood would have been in a competitive market, the jury's award of damages rests on no discernible factual foundation.[30]

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[29] Petitioners contended that southern mills could have continued charging on the basis of west coast freight as long as *any* west coast mill competed with southern mills in the market. Tr. 2913-2917, 3116-3117. Respondents, on the other hand, contended that, absent conspiracy, as more southern suppliers entered the southern market to meet local demand, southern prices would have *gradually* decreased to reflect the locational advantage, whether or not any west coast producers remained in the market. Tr. 2411-2412.

[30] The jury, of course, may " 'act upon probable and inferential, as well as direct and positive proof.' " *Bigelow* v. *RKO Radio Pic-*

B. The Jury's Damages Determination Should Be Set Aside And The Case Remanded For A New Trial On The Damages Issue

Because of the wide scope and duration of some conspiracies and Congress' determination to provide treble damages relief, potential liability in antitrust cases may amount to hundreds of millions of dollars. While that fact alone does not warrant special legal rules, it does underscore the need carefully to instruct the jury on all aspects of the three basic issues to be resolved in an antitrust case. It also requires reasoned scrutiny of the record to assure that the evidence supports the jury's resolution of those issues. In this case, the district court failed properly to charge the jury on the damages issue and failed to assess the adequacy of proof bearing on that issue.[31]

The purpose of Section 4 of the Clayton Act is broadly remedial. It aims not only to award ample compensation to victims of antitrust violations, but to penalize wrong-

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tures, Inc., supra, 327 U.S. at 264 (citation omitted); *Eastman Kodak Co.* v. *Southern Photo Materials Co., supra*, 273 U.S. at 379. But, while courts must accept some uncertainty in a damage award, the award "must be based on evidence furnishing data from which the amount of probable loss could be ascertained as a matter of reasonable inference." *Eastman Kodak Co.* v. *Southern Photo Materials Co., supra*, 273 U.S. at 379. "[D]amages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture." *Keogh* v. *Chicago & Northwestern Ry., supra*, 260 U.S. at 165.

[31] An explanation for this default may lie in the fact that the trial in this case originally was bifurcated, with the first proceeding covering "all issues except the amount of damages" (Pet. App. A-3). While the district court (Pet. App. C-6 to C-7) and the court of appeals (Pet. App. A-12) subsequently concluded that only the mathematical computation of damages had been severed, the lack of specific evidence on what the delivered price of plywood would have been in a competitive market, the failure of any party to request a jury instruction on the measure of damages, and the failure of the court to charge the jury on that issue, all lend credence to petitioners' claim that the measure of damages issue was in fact reserved for later trial.

doers by requiring them to disgorge their illegally obtained profits. *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 746 (1977). The treble damage penalty is meant to serve as a strong deterrent to anticompetitive conduct and to encourage private parties to undertake antitrust suits as an aid to antitrust enforcement. *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262 (1972). Nonetheless, "the potency of the remedy implies the need for some care in its application." *Blue Shield of Virginia* v. *McCready*, No. 81-225 (June 21, 1982), slip op. 11. Because of the trial court's failure to charge the jury on the proper measure of damages, and the insufficiency of the evidence to support the damages computation rendered by the jury, this case should be remanded for a retrial on the measure of damages issue.[32]

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[32] A trial on the damages issue will not, as the court of appeals believed, "unavoidably involve reconsideration" of issues resolved in the first trial (Pet. App. A-12). Under the instructions of the district court, the issues that have been resolved in this litigation are: (1) the existence of a conspiracy to fix prices, and (2) the fact of antitrust injury (see Tr. 3534, 3552). A second trial on the issue of damages will not involve reconsideration of those questions. Rather, it will require a rational estimate of the amount by which petitioners' prices exceeded those that would have prevailed absent the restraint found by the jury. Resolution of that issue—not directly addressed by either the trial court's instructions or the expert evidence previously presented—will not undermine "the integrity of the original jury verdict" (Pet. App. A-12).

CONCLUSION

The decision of the court of appeals should be affirmed on the issue of liability, and reversed on the issue of damages.

Respectfully submitted.

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Docket Sheet

NO. 81-1618-CFX	TITLE Weyerhaeuser Company and Willamette Industries, Inc., Petitioners
VIDE: 81-1619	v. Lyman Lamb Company, et al.

DOCKETED	COURT
Mar. 2, 1982	United States Court of Appeals for the Fifth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioners: William R. Jentes
	Counsel for Respondents: Harold E. Kohn , Dale E. Fredericks,
Jan. 13, 1982	Application for an extension of time to file petition for writ of certiorari and order granting same until Mar. 3, 1982 by White, J, on Jan. 18, 1982.
Mar. 2, 1982	Petition for writ of certiorari filed. (Record filed).
Mar. 2, 1982	Appendix filed.
Mar. 8, 1982	Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae filed.
March 11, 1982	Motion of The Business Roundtable for leave to file a brief as amicus curiae filed. (Vide: 81-1619).
March 11, 1982	Motion of National Association of Manufacturers for leave to file a brief as amicus curiae filed. (Vide: 81-1619).
March 17, 1982	Motion of Bowie-Sims-Prange, Inc., et al. for leave to file a brief as amici curiae filed.
March 22, 1982	Response of Lyman Lamb Company, et al. to the motions of The Chamber of Commerce of the United States, The National Association of Manufacturers, The Business Roundtable, and Bowie-Sims-Prange, Inc. et al. for leave to file briefs amicus curiae filed. (Vide: 81-1619
March 31, 1982	Brief for the respondents in opposition filed. (Vide: 81-1619
Apr. 7, 1982	Reply brief for the petitioner Weyerhaeuser Company filed.
Apr. 7, 1982	DISTRIBUTED. 4-23.
Apr. 14, 1982	Supplemental brief of respondents in opposition filed. (D). (Vide: 81-1619)
Apr. 27, 1982	REDISTRIBUTED. 4-30.
May 10, 1982	REDISTRIBUTED. 5-13.
May 17, 1982	The motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae is GRANTED. The motion of The Business Roundtable for leave to file a brief as amicus curiae is GRANTED. The motion of National Association of Manufacturers for leave to file a brief as amicus curiae is GRANTED. The motion of Bowie-Sims-Prange, Inc., et al. for leave to file a brief as amici curiae in No. 81-1618 is GRANTED. Petition GRANTED. The case is consolidated with 81-1619 and a total of one hour is allotted for oral argument. White and O'Connor, JJ., OUT.

81-1618

Title

No.

DATE	PROCEEDINGS AND ORDERS
June 8, 1982	Order extending time to file the joint appendix and petitioners' brief on the merits until Aug. 16, 1982.
July 21, 1982	Application for leave to file the petitioner's brief on the merits in excess of page limitations, and order granting same by Marshall, J., not to exceed 75 pages.
Aug. 13, 1982	Brief, amicus curiae, for the U.S. filed. (vide 81-1619)
Aug. 16, 1982	Brief for petitioners Weyerhaeuser Co. and Willamette Industries, Inc. filed. (Vide 81-1619)
Aug. 16, 1982	Joint appendix filed. (Vide 81-1619)
Aug. 16, 1982	Motion of the Business Roundtable, et al. for leave to file a brief as amici curiae. (Vide: 81-1619)
Aug. 18, 1982	Brief of the petitioner, Georgia-Pacific Corp. filed. (Vide: 81-1619)
Aug. 26, 1982	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for additional time for oral argument filed. (Vide 81-1619)
Sept. 13, 1982	Order extending time to file the respondents' brief on the merits until Oct. 15, 1982.
Sept. 17, 1982	Motion of City Investing Company and The International Telephone and Telegraph Corporation for leave to file a brief as amici curiae filed. (Vide: 81-1619).
Oct. 4, 1982	The motion of The Business Roundtable, et al. for leave to file a brief as amici curiae is GRANTED. The motion of City Investing Company, et al. for leave to file a brief as amici curiae is GRANTED. The motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument is GRANTED, and ten additional minutes are allotted for that purpose. White, J., OUT.
Sept. 30, 1982	Application for leave to file respondent's brief on the merits in excess of page limitations, and order granting same by Marshall, J., 10/4/82, not to exceed 70 pages.
Oct. 14, 1982	Brief, amici curiae, of the States of Alaska, Arizona, et al., in support of respondents filed. (Vide: 81-1619)
Oct. 14, 1982	Motion of Forty-One States and the District of Columbia for leave to participate in oral argument as amici curiae and for additional time for oral argument filed. (Also in 81-1619)
Oct. 15, 1982	Brief for the respondents filed. (Vide: 81-1619).
Oct. 15, 1982	Motion of The National Lumber and Building Material Dealers Association for leave to file a brief as amicus curiae filed. (Vide: 81-1619).
Oct. 15, 1982	Motion of respondents for relief from compliance with Rule 28.1 filed. (Also in 81-1619).

(Card No. 2)

No. 81-1618-CFX	TITLE Weyerhaeuser Company and Willamette Industries, Inc., Petitioners v. Lyman Lamb Company, et al.

DOCKETED	COURT
Mar. 2, 1982	United States Court of Appeals for the Fifth Circuit

DATE	PROCEEDINGS AND ORDERS
Oct. 25, 1982	DISTRIBUTED. 10-29. (Motion of respondents for relief from compliance with Rule 23.1).
Nov. 1, 1982	The motion of Alaska, et al. for leave to participate in oral argument as amici curiae and for additional time for oral argument is DENIED. The motion of National Lumber and Building Material Dealers Associati for leave to file a brief as amicus curiae is GRANTED. White, J., OUT.
Nov. 1, 1982	REDISTRIBUTED. 11-4. (Motion of respondents for relief from compliance with Rule 23.1)
Nov. 9, 1982	The motion of respondents for relief from compliance with Rule 28.1 is GRANTED. White, Powell and O'Connor, JJ., OUT.
Dec. 14, 1982	Reply brief of petitioners, Weyerhaeuser Company, et al. filed.
June 14, 1983	Dismissed under Rule 53.